Supreme Court, U.S.
F I L E D

991093 DEC 28 1999

OFFICE OF THE CLERK

No. ____

In The

Supreme Court of the United States

October Term, 1999

JOHN REZZONICO and JACQUELYN REZZONICO,

Petitioners,

-against-

H & R BLOCK, INC and H & R BLOCK EASTERN TAX SERVICES, INC., HRB ROYALTY, INC. ,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

NORMAN A. OLCH
Attorney for Petitioners
233 Broadway
New York, New York 10279
(212) 964-6171

PRINTINGHOUSE PRESS 25 WEST 43RD STREET NEW YORK, NY 10036 (212) 719-0990

53pp

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

QUESTIONS PRESENTED FOR REVIEW

1. Can a federal litigant rely on the notice of entry of judgment sent by the clerk of the District Court pursuant to Fed.R.Civ. P. 77(d) to establish the date from which the 30-day period for filing a notice of appeal, or the 10-day period for filing a Rule 59 motion for a new trial, commences?

2. If a litigant relies on the Rule 77(d) notice as set forth in Question One, and a Circuit Court later determines that the clerk's notice was incorrect or misleading and that the notice of appeal is therefore late, does such reliance constitute a "unique circumstance" which excuses the late filing of the notice of appeal?

3. Does the law of the case apply to the jurisdictional determination of one panel of a Circuit Court in a situation in which there are no new facts, no changed circumstances, and no pertinent intervening court rulings when the same case is before a second panel of the Circuit Court?

THE PARTIES TO THE PROCEEDING

The caption of the case contains all the parties to the proceeding.

TABLE OF CONTENTS

Questions Presented For Review i

The Parties to the Proceeding ii

Table of Contents iii

Table of Cited Authorities iv

Opinions of the Courts Below 1

The Basis for Jurisdiction in This Court 1

Constitutional and Statutory Provisions Involved 1

Statement of the Case 1

Reasons for Allowance of the Writ 4

1. There is a Circuit Conflict on Whether Parties Can Rely on the Fed.R.Civ.P. 77(d) Notice of Entry of Judgment or Other Official Written Communication to Measure the Time to File a Notice of Appeal 4

2. There is a Circuit Conflict on Whether Reliance on a Misleading or Erroneous Rule 77(d) Notice of Entry Constitutes "Unique Circumstances" Permitting a Late Notice of Appeal 7

3. There is a Circuit Conflict on Whether the Law of the Case Applies to Jurisdictional Determinations of Circuit Courts 9

TABLE OF CONTENTS *cont'd*

Appendix A-Opinion of the United States Court of Appeals for the Second Circuit A-1

Appendix B-Order of the United States Court of Appeals for the Second Circuit Denying Respondent's Motion to Dismiss the Appeal A-13

Appendix C-Order of the United States Court of Appeals for the Second Circuit Denying Petitioners' Motion for a Rehearing A-14

Appendix D-Federal Rule of Civil Procedure 6(a) A-16

Appendix E-Federal Rule of Civil Procedure 59(b) A-17

Appendix F-Federal Rule of Civil Procedure 77(c) A-18

Appendix G-Federal Rule of Civil Procedure 77(d) A-19

Appendix H-Federal Rule of Appellate Procedure 4(a)(1)(A) A-20

Appendix I-Federal Rule of Appellate Procedure 4(a)(4)(A)(v) A-21

Appendix J-Federal Rule of Appellate Procedure 4(a)(6) A-22

Appendix K-Second Circuit Local Rule 27(i) A-23

TABLE OF CITED AUTHORITIES

Cases:

Allen v. *Johnson*, 391 F.2d 527 (5th Cir. 1968)(en banc) . . . 10

Avolio v. *County of Suffolk*, 29 F.3d 50 (2nd Cir. 1994) 6

Bradley Mining Co. v. *Boice*, 205 F.2d 937 (9th Cir. 1953), *cert. denied*, 346 U.S. 874 (1953) 10

Christianson v. *Colt Industries Operating Corp.*, 486 U.S. 800 (1988) 9

EEOC v. *Neches Buane Prods. Co.*, 704 F.2d 144 (5th Cir. 1983) 9

Hollins v. *Department of Corrections*, 191 F.3d 1324 (11th Cir. 1999) 5

LaShawn A. v. *Barry*, 87 F.3d 1389 (D.C. Cir. 1996)(en banc) 9

McCuen v. *American Casualty Co.*, 946 F.2d 1401 (8th Cir. 1991) 9

MGIC Indemnity Corp. v. *Weisman*, 803 F.2d 501 (9th Cir. 1986) 5

Moore v. *South Carolina Labor Bd.*, 100 F.2d 162 (D.C. Cir. 1996) 5

Neu Cheese Co. v. *FDIC*, 825 F.2d 1270 (8th Cir. 1987) 5

Osterneck v. *Ernst & Whinney*, 489 U.S. 169 (1989) 7

TABLE OF CITED AUTHORITIES *cont'd*

Pioneer Investment Services Co. v. *Brunswick Associates Ltd. Partnership.*, 507 U.S. 380 (1993) 6, 9

Prudential-Bache Securities, Inc. v. *Fitch*, 966 F.2d 981 (5th Cir. 1992) 5, 6

Research Equity Fund, Inc. v. *Ins. Co. of North America*, 597 F.2d 1266 (9th Cir. 1979) 8

Sonicraft, Inc. v. *NLRB*, 814 F.2d 385 (7th Cir. 1987) 5

Taylor v. *FDIC*, 132 F.3d 753 (D.C. Cir. 1997) 9

Textile Mills Sec. Corp. v. *Commissioner*, 314 U.S. 326 (1941) 10

Thompson v. *INS*, 375 U.S. 384 (1964) 7

U.S. v. *Heller*, 957 F.2d 26 (1st Cir. 1992) 5

U.S. v. *Houser*, 804 F.2d 565 (9th Cir. 1986) 9

U.S. v. *Ibarra*, 502 U.S. 1 (1991) 7

West v. *United States*, 222 F.2d 774 (D.C. Cir. 1954) 5

Wilmer v. *Board of County Commissioners*, 69 F.3d 406 (10th Cir. 1995) 9

Other Authorities:

28 U.S.C. ¤ 46(c) 10

Federal Rule of Civil Procedure 6(a) 2

Other Authorities: *cont'd*

Federal Rule of Civil Procedure 58 8

Federal Rule of Civil Procedure 77(c) 8

Federal Rule of Civil Procedure 79(a) 8

Federal Rule of Appellate Procedure 4(a)(6) 6

Note, *Committee on Rules of Practice and Procedure of the Judicial Conference of the United States* 134 F.R.D. 744 6

Note, *Committee on Rules of Practice and Procedure of the Judicial Conference of the United States* 134 F.R.D. 698 . . . . . 6, 8

Revision Notes, 1948, 28 U.S.C.A. ¤ 46, p.51 (1993 ed.) . . . 10

Second Circuit Local Rule 27(i) 4, 10

OPINIONS OF THE COURTS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported below at 182 F.3d 144 (2nd Cir. 1999).

THE BASIS FOR JURISDICTION IN THIS COURT

The judgment of the Circuit Court was entered on June 29, 1999. The order of the Circuit Court denying the timely motion for a rehearing was entered on September 29, 1999. (Pet. A14).

This Court has jurisdiction to review the judgment of the Circuit Court by writ of certiorari pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Rules 59(b) and 77(d) of the Federal Rules of Civil Procedure, and Rule 4(a)(1) of the Federal Rules of Appellate Procedure. These rules are set forth in the appendix.

STATEMENT OF THE CASE

On November 26, 1997 judgment was entered in the United States District Court for the District of Vermont against John and Jacquelyn Rezzonico ("Petitioners") and in favor of H&R Block, Inc. ("Respondent"). The judgment was based on a grant of summary judgment to respondent in its dispute with petitioners over certain terms of the franchise contracts under which petitioners operated three income tax return preparation services in Vermont and New Hampshire.[1]

The day the judgment was entered the clerk of the court sent a "Notice to Litigants" pursuant to Fed.R.Civ.P. 77(d) which informed the parties of the date of the entry of the judgment, quoted the 30-day time limit for filing a notice of appeal imposed by Fed.R.App.P. 4(a)(1), and explicitly stated "Notice of Appeal MUST be filed on or before December 29, 1997". (emphasis in original).

---

[1]The action was commenced in state court in Vermont and removed to the federal district court pursuant to 28 U.S.C. § 1441.

Five days later, on December 1, 1997, an Amended Judgment was entered. The amendment consisted of inserting the word "not" in a paragraph of the judgment.[2]

That same day the clerk sent out a new Rule 77(d) "Notice to Litigants" informing the parties that the judgment had been entered, reciting the 30 days for filing a notice of appeal, and explicitly instructing them that the "Notice of Appeal MUST be filed on or before December 30, 1997". (emphasis in original). In addition, the clerk entered on the docket sheet, "Appeal to be filed by 12/30/97."

On December 15, 1997 petitioners filed two motions with the District Court: one for reconsideration of the order directing entry of the judgment, and one for a new trial pursuant to Fed.R.Civ.P. 59. Excluding intervening Saturdays and Sundays, *see* Fed.R.Civ.P. 6(a), the latter motion was filed within 10 days of the December 1, 1997 entry of the amended judgment as required by Rule 59(b). In an affidavit submitted to the Second Circuit, petitioners' counsel Peter Welch stated that in filing the Rule 59 motion he relied on the clerk's second Rule 77(d) notice which indicated that the time to appeal (and therefore the time to file a Rule 59 motion) would now be measured from the December 1, 1997 entry of the amended judgment.

On December 17, 1997 Maureen Ragan, an associate in Welch's firm, telephoned the clerk of the District Court to inquire about the status of the two motions. A deputy clerk informed her

---

[2] As a result, a sentence which read in the first judgment,

> "Under the contracts at issue, the Rezzonicos are entitled to take advantage of the discount royalty rate otherwise afforded franchisees who are not in breach of their franchise agreement."

now read in the amended judgment,

> "Under the contracts at issue, the Rezzonicos are *not* entitled to take advantage of the discount royalty rate otherwise afforded franchisees who are not in breach of their franchise agreement." (emphasis and italics in original).

that the District Judge had denied both motions on December 16th; that the denials had been entered on the docket on December 17th; and that the motion for reconsideration had been denied as "untimely." Ragan specifically inquired about the timeliness of the Rule 59 motion and the deputy clerk informed her that the judge had considered that motion timely and had decided it on the merits.

To be certain, Ragan asked the deputy clerk to read the judge's orders to her over the telephone. The clerk's reading confirmed that the judge had explicitly denied the motion for reconsideration as "untimely"; there is no such qualification in the order denying the Rule 59 motion which simply says "Denied." The face of the orders confirms the information provided by the clerk on the telephone, as do the entries on the docket sheet. A notice of appeal was then filed within 30 days of the December 17th entry of the order denying the Rule 59 motion.

It is undisputed that if measured from the December 1, 1997 entry of the amended judgment, the Rule 59 motion, and the notice of appeal filed after the motion was denied, were both timely.

Respondent moved in the Second Circuit to dismiss the appeal on the grounds the notice of appeal was untimely: the period for measuring the time to file a Rule 59 motion and a later notice of appeal, respondent maintained, commenced with the November 26th entry of the first judgment, and not with the December 1st entry of the amended judgment.

A three-judge panel of the Second Circuit heard full oral argument and unanimously denied on the merits respondent's motion to dismiss the appeal. (Pet. A13) The parties thoroughly briefed the issue for the panel: respondent's motion was supported by an eight-page memorandum of law and nine exhibits, and was supplemented by a nine-page memorandum of law replying to petitioners' opposition to the motion. Petitioners submitted a 10-page memorandum of law accompanied by 17 affidavits and exhibits precisely setting forth the proceedings in the District Court.

Respondent did not seek in banc review of the panel's

decision as provided by the local Second Circuit rules. *See,* Local Rule 27(i). Instead, in responding to petitioners' later brief on the merits, it again raised the jurisdictional issue. This time, however, a Circuit panel consisting of three different judges agreed, and ruled in an opinion that the appeal must be dismissed because the notice of appeal was untimely. (Pet. A1). The second panel concluded that it was not bound by the first panel's decision (Pet. A4-A7); that because the amended judgment did not work a material change in the original judgment the time to appeal commenced with the entry of the first judgment (Pet. A7-A10); and that parties can never rely on the clerk's Rule 77(d) notice to measure the time within which to file a Rule 59 motion or a notice of appeal (Pet. A11). The record before the second panel was exactly the same as that before the first panel, and there were no pertinent intervening court rulings or other legal developments between the decisions of the first and second panel decisions.

Petitioners' timely motion for a rehearing with a suggestion for a rehearing in banc was denied. (Pet. A14).

REASONS FOR ALLOWANCE OF THE WRIT

1. There is a Circuit Conflict on Whether Parties Can Rely on the Fed.R.Civ.P. 77(d) Notice of Entry of Judgment or Other Official Written Communication to Measure the Time to File a Notice of Appeal

In a sharp departure from the views of other Circuit Courts which have ruled that a litigant can rely upon a clerk's official written communication to measure the date from which a notice of appeal must be filed, the Second Circuit unequivocally concluded:

> "We have never held that a party may rely on the Rule 77(d) notice it receives to restart its time to appeal, and we decline to do so here." (Pet A11).

In contrast, after the Second Circuit ruled in this case, the

Eleventh Circuit concluded that an appeal is not untimely when a final order is entered on the docket but the district court clerk's office does not make the entry on the court's electronic docket information system—a system upon which there is an "officially invited reliance" by litigants and attorneys. *Hollins* v. *Department of Corrections,* 191 F.3d 1324, 1325-1326 (11th Cir. 1999).

Similarly, the Fifth Circuit has concluded that parties can rely on a clerk's Rule 77(d) notice, *Prudential-Bache Securities, Inc.* v. *Fitch,* 966 F.2d 981, 985-986 (5th Cir. 1992)("Parties may rely on the accuracy of the clerk's [Rule 77(d)] notice that is regular on its face."); the Ninth Circuit has ruled that when a clerk erroneously changes a docket sheet to reflect a later entry date, "it would be harsh, overtechnical, and contrary to substantive justice to hold [appellant] was bound by the earlier date", *MGIC Indemnity Corp.* v. *Weisman,* 803 F.2d 501, 502 (9th Cir. 1986); the D.C. Circuit has ruled that a party can reasonably assume that written information provided by the clerk of the court is accurate, *West* v. *United States,* 222 F.2d 774, 779 (D.C. Cir. 1954); and the Eighth Circuit has ruled that an appellant will not suffer dismissal of an appeal because a letter from the clerk of the Circuit Court "lulled [appellant's] counsel into believing" that a premature notice of appeal would be docketed at a later and correct time. *Neu Cheese Co.* v. *FDIC,* 825 F.2d 1270, 1272 (8th Cir. 1987).

Significantly, the Second Circuit opinion cites no case in which a party has lost his right to appeal after relying upon an official written communication from the clerk of the court to measure the time within which to file a notice of appeal. The three cases relied upon by the Second Circuit all deal with *oral* "assurances" or *oral* "advice" from the clerk's office regarding a notice of appeal. *Moore* v. *South Carolina Labor Bd.,* 100 F.2d 162 (D.C. Cir. 1996); *U.S.* v. *Heller,* 957 F.2d 26 (1st Cir. 1992); *Sonicraft, Inc.* v. *NLRB,* 814 F.2d 385 (7th Cir. 1987). While there may be sound policy reasons for holding that a party cannot rely on *oral* advice or assurances from the clerk's office, *Moore* v. *South Carolina Labor Bd.,* 100 F.2d at 164 (limiting "unique circumstances" to formal or written court matters "raises virtually no possibility of evidentiary problems for appellate courts faced

with applying the exception"), such considerations have no application to the official, written Rule 77(d) notice.

This Court, too, has recognized the reliance the public and the Bar place on official written notices from the clerk's office, and in *Pioneer Investment Services Co.* v. *Brunswick Associates Ltd. Partnership.*, 507 U.S. 380 (1993), concluded that creditors should not be time barred from filing proofs of claim in Bankruptcy Court inasmuch as the clerk's notice to creditors contained a "dramatic ambiguity" regarding the bar date. 507 U.S. at 398.

Similarly, a 1991 amendment to the Federal Rules of Appellate Procedure contradicts the Second Circuit view that no reliance can be placed on the clerk's Rule 77(d) notice. Appellate Rule 4(a)(6) was added to indicate in substance that in the event the clerk sends a late 77(d) notice which is received after the time to file a notice of appeal has passed, the appealing party can petition the District Court to reopen the time to file the notice of appeal. A companion change was made in Rule 77(d). *See e.g., Avolio* v. *County of Suffolk,* 29 F.3d 50 (2nd Cir. 1994).

This Rule change was made to provide relief when the 77(d) notice is sent so late as to "impair the opportunity to file a timely notice of appeal." Note, *Committee on Rules of Practice and Procedure of the Judicial Conference of the United States ("Committee"),* 134 F.R.D. 744. Recognizing the reliance parties place on the 77(d) notice, the Committee noted that the rule changes were designed to correct Circuit Court decisions which had held that the clerk's tardy mailing of the 77(d) could not excuse a late notice of appeal. Note, 134 F.R.D. 698-699.

In short, the view of the Second Circuit—that erroneous or misleading written communications by the clerk's office have no bearing on the time to file a notice of appeal—is no longer the philosophy of the Federal Rules. Instead, the new rule places "additional importance" on the 77(d) notice. *Prudential-Bache Securities, Inc.* v. *Fitch,* 966 F.2d 981, 986 n.2 (5th Cir. 1992).

In light of appellate Rule 4(a)(6) the Second Circuit decision here means that if the clerk errs and sends a tardy 77(d) notice, a party can rely on the clerk's error to reopen the time to

appeal; but if the clerk errs and sends a timely but misleading notice, reliance on that notice will result in the loss of the right to appeal. Not only does this fly in the face of commonsense, but it squarely conflicts with the more sensible views of other Circuits and of this Court regarding the important role of official written communications from the clerk's office, and the reliance litigants reasonably place on those communications.

Litigants should not "be required to guess at their peril the date on which the time to appeal commences to run." *U.S.* v. *Ibarra,* 502 U.S. 1, 7 (1991). Rule 77(d) notices are required in every federal civil case across the United States which goes to final judgment. The Second Circuit decision ignores the sensible view expressed by other Circuits and promotes guesswork when the only acceptable goal is certainty.

2. There is a Circuit Conflict on Whether Reliance on a Misleading or Erroneous Rule 77(d) Notice of Entry Constitutes "Unique Circumstances" Permitting a Late Notice of Appeal

The reasons which argue in favor of a party relying on the clerk's Rule 77(d) notice of entry of judgment to measure the time within which to file a notice of appeal, *supra,* apply with equal force to the proposition that under the "unique circumstances" doctrine, *Thompson* v. *INS,* 375 U.S. 384, 387 (1964)(per curiam), a party should not lose his right to appeal if it is later determined by an appellate court that the 77(d) notice contained information which misled a litigant.

Under the "unique circumstances" doctrine a party does not lose his right to appeal where he "has performed an act which if properly done, would postpone the deadline for filing his appeal and has received specific assurance by a judicial officer that this act has been properly done." *Osterneck* v. *Ernst & Whinney,* 489 U.S. 169, 179 (1989).

Petitioner maintains his Rule 59 motion for a new trial properly postponed his time to file the notice of appeal pursuant to Fed.R.App.P. 4(a)(4)(A)(v) because he received multiple assurances that his motion was timely: the clerk's second Rule 77(d) restarted the time for filing the Rule 59 motion and the

notice of appeal; while simultaneously denying a companion motion as "untimely," the District Judge attached no such qualification to his denial of the Rule 59 motion, thereby indicating it had been timely and decided on the merits; and the clerk of the court explained to petitioners' counsel that the face of the judge's order and the docket sheet entries indicated that the judge had deemed the Rule 59 motion timely and had addressed it on the merits. "The clerk of the court is the ultimate authority regarding entries on the court's docket." *Research Equity Fund, Inc.* v. *Ins. Co. of North America,* 597 F.2d 1266, 1267 (9th Cir. 1979). Without such assurances, the record explicitly shows, petitioners' counsel would have filed the notice of appeal within the time required by the Second Circuit decision.

The Second Circuit's view that the "judicial" assurance of the "unique circumstances" rule can come only from the judge himself, is, as noted above, at odds with those Circuits which recognize that reliance on the clerk's official written communications satisfies the rule. Reliance on the clerk's written communications is reasonable if not necessary as an increasing number of federal litigants and their attorneys do not have ready access to clerk's office records because they do not live or work in the district where the litigation is pending. Note, Committee, 134 F.R.D. 698, 699.

Such reliance is appropriate. It is, afterall, the clerk and not the judge who enters the judgment, Fed.R.Civ.P. 58, it is the clerk who is charged with the responsibility of making the docket sheet entries, Fed.R.Civ.P. 79(a), and it is reasonable for parties to presume that the clerk is conveying accurate information when he sends out the required Rule 77(d) notice of entry. If the clerk acts improperly, his actions may be "suspended or altered or rescinded by the Court." Fed.R.Civ.P. 77(c). Respondent made no complaint to the clerk or to the District Judge that the second Rule 77(d) notice was erroneous.

Because it is appropriate for litigants to rely on the clerk's Rule 77(d) notice, the better rule is that the "unique circumstances" doctrine would apply where the clerk's written notice misleads a party with respect to the time within which a

notice of appeal must be filed. If a "dramatic ambiguity" in a clerk's notice does not time bar a notice of claim in bankruptcy court, *Pioneer Investment Services Co.* v. *Brunswick Associates Ltd. Partnership., supra* p. 6, a dramatic error or misleading statement in the clerk's Rule 77(d) notice should not bar an appeal.

3. There is a Circuit Conflict on Whether the Law of the Case Applies to Jurisdictional Determinations of Circuit Courts

Despite this Court's admonitions that courts should be "loathe" to depart from the law of the case in the absence of extraordinary circumstances, *Christianson* v. *Colt Industries Operating Corp.*, 486 U.S. 800, 817 (1988), and that the law of the case should not be applied "less rigorously" to jurisdictional matters, *Id.* at 816 n.5, the Circuit courts are divided over the question of whether the law of the case applies to the jurisdictional determinations of a panel of a Circuit Court.

The Second Circuit view that the law of the case does not apply to jurisdictional rulings of a Circuit Court panel, while followed in the Fifth and Ninth Circuits, *EEOC* v. *Neches Buane Prods. Co.*, 704 F.2d 144, 147 (5th Cir. 1983); *U.S.* v. *Houser*, 804 F.2d 565, 568 (9th Cir. 1986), is not followed in the D.C., Eighth, and Tenth Circuits. *Taylor* v. *FDIC*, 132 F.3d 753, 761 (D.C. Cir. 1997); *LaShawn A.* v. *Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996)(en banc); *McCuen* v. *American Casualty Co.*, 946 F.2d 1401, 1403 (8th Cir. 1991); *Wilmer* v. *Board of County Commissioners*, 69 F.3d 406, 409-410 (10th Cir. 1995).

The Second Circuit view that even in the absence of new facts or new case law one panel can disregard the jurisdictional determination of another panel in the same case is ill-advised for three reasons.

First, this view promotes disrespect for the law because the outcome depends not on new information or changed circumstances, but on the bald fact that three different judges are sitting. "Inconsistency is the antithesis of the rule of law." *LaShawn A.* v. *Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996)(en

banc).

Second, the procedure followed by the Second Circuit is particularly disturbing because it ignores the printed rules of that court which require a party dissatisfied with the first panel's motion ruling to seek in banc review. Local Rule 27(i). Respondent simply waited for another three-judge panel. The process due the petitioners was not followed.

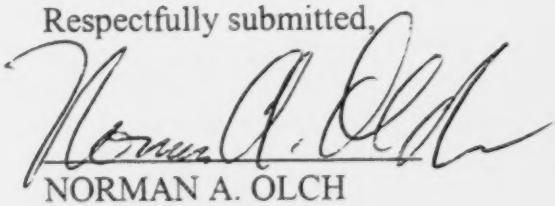
Third, as this case illustrates, the approach imposes an unfair and costly burden on litigants because it requires them to incur considerable attorneys fees and printing costs to brief the case on the merits, only to have the second panel dismiss the case for reasons already rejected by the first panel.

Finally, there is the institutional concern. Circuit courts sit in panels of not more than three judges, 28 U.S.C. § 46(c), and a decision of one panel is a "decision of the court." Revision Notes, 1948, 28 U.S.C.A. § 46, p.51 (1993 ed.); *Bradley Mining Co.* v. *Boice,* 205 F.2d 937, 938 (9th Cir. 1953), *cert. denied,* 346 U.S. 874 (1953)(a panel of the court "constitute[s] the court"). The sound rule that one panel cannot overrule the decision of another panel is grounded in the concern that finality of appellate decisions would yield to constant conflicts within the circuit if the rule were otherwise. *Textile Mills Sec. Corp.* v. *Commissioner,* 314 U.S. 326, 335 (1941). There is also the concern that an issue not be decided by more than three, but less than all, the judges of a Circuit Court. *Allen* v. *Johnson,* 391 F.2d 527, 532 (5th Cir. 1968)(en banc). Indeed, in this case, six judges have considered the same issue on the same record and are equally divided.

CONCLUSION

THE PETITION SHOULD BE GRANTED TO RESOLVE (1) THE CONFLICT IN THE CIRCUITS OVER WHETHER A FEDERAL CIVIL APPELLANT CAN RELY ON THE CLERK'S RULE 77(d) WRITTEN NOTICE OF ENTRY OF JUDGMENT TO MEASURE THE TIME WITHIN WHICH TO FILE A NOTICE OF APPEAL; AND (2) THE CONFLICT IN THE CIRCUITS OVER WHETHER THE LAW OF THE CASE APPLIES TO CIRCUIT COURT JURISDICTIONAL DETERMINATIONS.

Respectfully submitted,



NORMAN A. OLCH
Attorney for Petitioners
233 Broadway
New York, New York 10279
(212)964-6171

December 28, 1999

EXHIBIT A

BEST AVAILABLE COPY

APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR TE SECOND CIRCUIT

August Term, 1998
(Argued November 6, 1998 Decided
Docket No. 98-7060

JOHN REZZONICO and JACQUELYN REZZONICO,
Defendant-Plaintiff-Counterclaim-defendant-Appellant,

v.

H & R BLOCK, INC. and H & R BLOCK EASTERN TAX SERVICES, INC.,
Defendant-Counterclaim-Plaintiff-Appellee,

H & R ROYALTY, INC., Add as party from consolidated case,
Plaintiff

Before:
KEARSE, CERDAMONE and POOLER
Circuit Judges

Plaintiffs John and Jacquelyn Rezzonico appeal from a judgment entered November 26, 1997 in the United States District Court for the District of Vermont (Murtha, C.J.), granting H&R Block, Inc.'s motion for summary judment.

Dismissed.

NORMAN A. OLCH, New York, New York, for Appellants

PETER J. KLARFELD, Wiley, Rein & Fielding, Washington, D.C. for Appellees.

CARDAMONE, Circuit Judge:

We must decide two preliminary questions that will determine whether we reach the merits of this appeal; first, whether we may properly reconsider a decision of a motions panel denying defendant's motion to dismiss the appeal for lack of appellate jurisdiction; second, whether upon reconsidering the subject of our jurisdiction we must dismiss this appeal as untimely. We answer both of these questions in the affirmative. Also before us is whether "unique circumstances" exists that will excuse an otherwise untimely appeal. We answer this question in the negative because we are not persuaded that the elements of the "unique circumstances" test are met; that is, specific assurances, with respect to an act effectively postponing the filing deadline for taking an appeal, were not given by a judicial officer. Hence, while the merits of the appeal present an engaging question of contract interpretation in the face of new computer technology, we do not reach that issue.

Plaintiffs John and Jacquelyn Rezzonico (plaintiffs of appellants) appeal from a judgment entered November 26, 1997 in the United States District Court for the District of Vermont (Murtha, C.J.), granting H&R Block, Inc., H&R Block Eastern Tax Services, Inc. and HRB Royalty, Inc.'s (collectively, Block or defendant) motion for summary judgment. On March 24, 1998 a motion panel of this court denied Block's motion to dismiss the appeal as untimely. Subsequently, the present merits panel heard the appeal. We conclude that because plaintiffs did not file their appeal in a timely fashion we lack jurisdiction to hear it. It must therefore be dismissed.

BACKGROUND

Plaintiffs had franchise contracts with Block to operate three H&R Block tax return preparation offices, one in New Hampshire and two in Vermont. In January 1994 defendant terminated those

agreements for alleged underpayment of royalties and other breaches of contract. The following month, plaintiffs responded by filing suit against defendant in state court, asserting claims for breach of contract and bad faith and seeking declaratory relief under the terms of their franchise agreements. Blocked removed the action to the United States District Court for the District of Vermont and asserted counterclaims for fraud and breach of contract and sought declaratory relief. In a separate action, HRB Royalty , Inc., the owner of the H&R Block service mark, sued the Rezzonicos for service mark infringement and unfair competition. HRB Royalty's action was consolidated with the action filled by the Rezzonicos. The underlying dispute in the consolidated actions involved, inter alia, whether the terms "preparation of income tax returns" and "related services," upon which plaintiffs were required to pay royalties to defendant, included the electronic filing of tax returns, a system of filing made possible by new technology that was introduced after the parties entered into the subject franchise agreements.

In March 1996 Block moved for summary judgment with respect to all claims and counterclaims asserted in the consolidated actions. A year later the district court by order dated March 21, 1997 adopted the report and recommendation of a magistrate judge and granted defendants' motion. In May 1997 it held an evidentiary hearing to determine the appropriate relief, and on November 20, 1997 issued an order for entry of final judgment, awarding defendants' monetary, injunctive and declaratory relief, and dismissing all of plaintiffs' claims with prejudice. The memorandum and order provided, in part

> Upon review, he Court finds Block is entitled to an additional reward of $237,324. Under the contracts at issue, the Rezzonicos are not entitled to take advantage of the discount royalty rate otherwise afforded franchisees who are not in breach of their franchise agreement. (emphasis added)

On November 26, 1997 judgment was entered, mistakenly omitting the word "not" from the emphasized portion, and copies were served on the parties. Along with the judgment the parties

were sent, pursuant to Fed. R. Civ. P. 77(d), a form signed by a deputy clerk, entitled "Notice of Litigants," which stated that "the Judgment or Order" had been filed and entered on the docket on November 26, 1997 and that a notice of appeal must be filed on or before December 29, 1997.

On December 1, 1997 the clerk of the district court entered an amended judgment, adding the mistakenly omitted word "not" to the referenced sentence. The docket entry relating to the amended judgment states that the purpose of the amendment was "to correct [a] clerical error." Copies of the amended judgment were sent to the parties with another Rule 77 (d) "Notice to Litigants," this time stating that the judgment was filed and entered on December 1, 1997 and that a notice of appeal must be filed on or before December 30, 1997. On December 15, 1997 appellants filed with the district court a "Motion for Reconsideration" and a "Motion for New Trial" pursuant to Fed. R. Civ. P. 59. Both motions were denied by orders entered on December 17, 1997. In denying the motion for reconsideration, the trial court stated that " [b]ecause plaintiffs primarily seek reconsideration of issues determined months ago on summary judgment, the motion to reconsider is DENIED as untimely ." The district court endorsed the motion for a new trial "DENIED."

On January 13, 1998 plaintiffs filed a notice of appeal. Defendant then filed a motion seeking to dismiss the appeal for lack of appellate jurisdiction. A motions panel of this Court denied the motion to dismiss on March 24, 1998.

DISCUSSION

I Decision of Motions Panel

Appellants aver in their brief that application of the law of the case doctrine bars us from reconsidering the question of appellate jurisdiction because it was previously considered and decided by the motions panel, which denied Block's motion to dismiss the appeal. Law of the case and res judicata are closely related legal concepts both resting on policy considerations favoring putting an end to litigation, saving judicial time, and bringing certainty to legal relations. See Commissioner v. Sunnen, 333 U.S. 591, 597 (1948). Since we deal on this appeal

with the former legal concept, it is helpful to distinguish the latter.

After a final judgment on the merits rendered by a court of competent jurisdiction, res judicata bars subsequent litigation between the same parties and those in privity with them involving the same cause of action. See Anaconda-Ericsson Inc. v. Hessen (In re Tel tronics Servs., Inc,) , 762 F.2d 185, 190 (2d Cir. 1985) If subsequent litigation arises from the same cause of action, both those matters actually offered to sustain the claim and those that might have been offered in the prior action are barred from being relitigated; that is, there is claim preclusion. See id.

If subsequent litigation arises from a different cause of action, the prior judgment bars only those matters or issues common to both actions that were expressly or by necessary implication adjudicated in the prior litigation. This prong of res judicata is referred to as issue preclusion. The Supreme Court has stated that issue preclusion means that when an issue has been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. See Schiro v. Farley, 510 U.S. 222, 232 (1994).

The doctrine of law of the case is similar to the issue preclusion prong of res judicata in that it limits relitigation of an issue once it has been decided. However, law of the case is concerned with the extent to which law applied in a decision at one stage of litigation becomes the governing principle in later stages of the same litigation. Res judicata does not speak to direct attacks in the same case, but rather has application in subsequent actions.

Questions regarding application of law of the case arise when a party directly attacks a decision by attempting to have it corrected, annulled, reversed, vacated or declared void by the court that made it. "As most commonly defined, the doctrine [of law of the case] posits that when a court decides upon a rule of law, that decision should [generally] continue to govern the same issues in subsequent stages in the same case." Arizona v.California, 460 U.S. 605, 618 (1983); see also 18 Charles Alan Wright et al., Federal Practice and Procedure § 4478, at 788-89 (1981) Application of the law of the case doctrine varies

depending upon the context. Although rulings of the district court are subject to revision by that court "at any time before the entry of final judgment," Fed. R. Civ. P. 54(b); accord Cullen v. Margiotta, 811 F.2d 698, 708 (2d Cir. 1987), overruled on other grounds Agency Holding Corp. v. Malley-Duff & Assocs.,Inc., 483 U.S. 143 (1987), under law of the case a trial court cannot reconsider on remand an issue decided by an appellate court, see Insurance Group Comm. v. Denver & Rio Grande W.R.R., 329 U.S. 607, 612 (1947).

In contrast, the law of the case doctrine does not deprive an appellate court of discretion to reconsider its own prior rulings, even when the ruling constituted a final decision in a previous appeal. See, e.g.,Soto-Lopez v. New York City Civil Serv. Comm'n, 840 F.2d 162, 168 (2d Cir. 1988); United States v. Fernandez, 506 F.2d 1200, 1203 (2d Cir. 1974) ("An issue decided on a prior appeal is not foreclosed with all the finality of res judicata when the case comes back to this court.") . While informing the court's discretion, law of the.case "does not limit the tribunal's power. " Arizona, 460 U.S. at 618. However, we do not revisit such a final decision "absent 'cogent' or 'compelling', reasons, " Doe v. New York City Dep't of Social Servs, 709 F.2d 782, 789 (2d Cir. 1983) .

Because law of the case doesn't bind an appellate court even as to final orders, it follows that the doctrine is even less binding in the context of interlocutory orders. We have previously held when considering an appellate Court's grant of leave to appeal under 28 U.S.C. § 1292(b) that a motions panel's grant of such leave "is provisional since the merits panel that hears the certified appeal is free to review that subject again." Koehler v Bank of Bermuda Ltd., 101 F.3d 863, 866 (2d Cir.1996). The principle that some issues decided by a motions panel are only provisional or interlocutory permits us to reconsider the timeliness of the appeal at issue here.

Several reasons persuade us of the soundness of this conclusion. First, as discussed above, the law of the case doctrine is discretionary, not mandatory. The doctrine expresses, in shorthand fashion, a practice of courts generally not to reconsider

that which has already been decided. But it does not purport to be a legally binding limitation on the court's authority to reconsider such matters. Second, a motions panel's decision is based on an abbreviated record and made without the benefit of full briefing by the parties, which may result in a less than thorough exploration of the issues. See Stifel, Nicolaus & Co. v. Woolsey & Co., 81 F.3d 1540, 1544 (10th Cir. 1996) . Third, reexamination of a question regarding our jurisdiction is especially important whenever there is reason to believe that it may be lacking. See Fed. R. Civ. P. 12(h) (3); see also Transatlantic Marine Claims Agency. Inc. v. Ace Shipping Corp., 109 F.3d 105, 107-08 (2d Cir. 1997); United States v. Houser 804 F.2d 565, 568 (9th Cir. 1986).

Moreover, in ruling that we may revisit the motions panel's decision on jurisdiction, we join nearly every other Circuit that has considered this question. See, e.g., CNF Constructors, Inc. v. Donohoe Constr. Co., 57 F.3d 395, 397-98 n.1 (4th Cir. 1995); EEOC v. Neches Butane Prods. Co., 704 F.2d 144, 147 (5th Cir. 1983); American Fed' n of Grain Millers, Local 24 v. Cargill Inc., 15 F.3d 726, 727 (7th Cir. 1994); McCuen v. American Cas. Co., 946 F.2d 1401, 1403 (8th Cir. 1991); Houser, 804 F.2d at 568 (9th Cir.); Stifel, Nicolaus & Co., 81 F.3d at 1544 (10th ,Cir.). But see Taylor v. FDIC, 132 F.3d 753, 761 (D.C. Cir. 1997) (motions panel's denial of motion for dismissal is law of the case and "binding"). We therefore proceed to examine the timeliness of the instant appeal.

II Timeliness of Appeal

Block asserts that we lack jurisdiction because the notice of appeal was untimely and no unique circumstances permitting an untimely appeal are present. Appellants contend that their appeal was timely because the time to appeal ran from the date of entry of a modified judgment, or that, in any event, their lateness was excusable in light of information they received from the district court clerk's office. They maintain that we thus have jurisdiction over the appeal and should decide the case on its merits.

A. General Rule

We turn first to the Federal Rules of Appellate Procedure.

Those rules provide that a notice of appeal in a civil case to which the United States is not a party must be filed within 30 days of entry of the judgment from which the appeal is taken. See Fed. R. App. P. 4(a) (1) . Rule 4(a), which sets out the 30-day time limit within which this appeal had to have been taken, serves the salutary purpose of fixing the point at which litigation shall end -- if an appeal has not been taken before that date -- thereby relieving prospective appellees of the demands appellant is making against them. The Rule 4 (a) time limit is mandatory, and when an appeal is taken beyond the time, set out in the Rule, an appellate court is without jurisdiction to entertain and decide it. Thus, the limit is said to be "mandatory and jurisdictional." Browder v. Director, Dep't of Corrections, 434 U.S. 257, 264 (1978) .

The time period for filing a notice of appeal can be extended only in certain narrow circumstances, including the timely filing of one of the tolling motions specified under Fed. R. App. P. 4(a) (4), which encompasses motions under Fed. R. Civ. P. 59 to amend the judgment or for a new trial. Fed. R. App. P. 4(a) (4) (iii)-(iv) . Upon denial of one of these motions, the 30-day period starts anew. But, to receive the benefit of this tolling effect, the appealing party must file the amending motion within ten days of the entry of the underlying judgment. See Fed. R. Civ. p 6(b) , 59(b); Fed. R. App. P. 4 (a) (4) .

Having discussed the Rules, we pass next to their application in the case at hand. The original judgment was entered on November 26, 1997 and appellants thereafter filed two motions: a motion for a new trial and a motion to reconsider. Both motions were filed on December 15, 1997, more than ten days after the entry of judgment. Consequently, the motions had no tolling effect. The Rezzonicos' notice of appeal was filed on January 13, 1998, more than 30 days from entry of the original judgment. Hence, when measured from the date of the original judgment, their appeal is untimely .

Appellants maintain that we must measure their time to appeal and to file tolling motions from the date of the amended judgment entered December 1, and not from the November 26

date of the original judgment. Specifically, they assert that since the amended judgment added the word "not," it "effected a material change in the judgment" and restarted their time for filing the notice of appeal and for filing any tolling motions. Block declares that the amended judgment simply corrected a clerical error, and thus did not restart the time to take an appeal.

The long established rule states that "[o]nly when the lower court changes matters of substance, or resolves a genuine ambiguity, in a judgment previously rendered should the period within which an appeal must be taken. . . begin to run anew. The test is a practical one." FTC v. Minneapolis-Honeywell Regulator Co., 344 U.S. 206, 211-12 (1952) . The parties had contested whether the Rezzonicos were entitled to a discounted royalty rate provided in the franchise agreement, and the inclusion of the word "not" in the amended judgment, the Rezzonicos contend, effected a material change with respect to that issue.

In determining what constitutes a clerical error, our analysis is informed by the corrections permitted under Fed. R . Civ. P. 60(a), which provides

> [c] lerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

In deciding whether Rule 60(a) applies, courts distinguish "between changes that implement the result intended by the court at the time the order was entered and changes that alter the original meaning to correct a legal or factual error," because Rule 60(a) allows for the former, but not the latter. Kokomo Tube Co. v. Dayton Equip. Servs. Co., 123 F.3d 616, 623 (7th Cir. 1997). Thus, courts often examine in detail the text of the district court's prior pronouncement. See id. at 623-24 (judgment substituting another party for party in favor of whom the district court order granted judgment ruled a clerical error because district court's intent was clear from order) .

Here, the omission of the word "not" from the original

judgment was a clerical mistake. The district court's ruling and intention are clear from its memorandum and order. Block was seeking damages of $237,324 as "additional royalty due on the Rezzonicos' gross receipts" and that amount was the difference between the 40 percent royalty rate claimed by Block and the 30 percent royalty rate the Rezzonicos had already paid. The district court's $237,324 award reflected the 10 percent difference in the disputed royalty rates, resulting from its finding that plaintiffs were not permitted to take advantage of the 30 percent discount royalty rate. Moreover, the omission of the word "not" from the judgment did not substantively affect the Rezzonicos' liability; in fact, even the original judgment required appellants to pay defendant $237,324.

The omission considered by itself concededly changed the meaning of the sentence, but the district court's memorandum and order, as well as the preceding sentence in the judgment, clarifies that appellants were not permitted to take advantage of the discounted rate. For these reasons, the filing of the amended judgment did not restart the Rezzonicos' time to appeal or to file tolling motions.

B."Unique Circumstances" Doctrine

Finally, invoking the "unique circumstances " doctrine first enunciated by the Supreme Court in Thompson v. INS, 375 U.S. 384, 387 (1964) (per curiam), the Rezzonicos maintain that even if their notice of appeal was untimely we may still hear the appeal. The unique circumstances doctrine applies "only where a party has performed an act which, if properly done, would postpone the deadline for filing his appeal and has received specific assurance by a judicial officer that this act has been properly done." Osterneck v. Ernst & Whinney, 489 U.S. 169, 179 (1989). Appellants maintain that these criteria are met and that this doctrine excuses the untimeliness of their appeal.

The Rezzonicos contend they received a series of assurances from the district court that their time to appeal would be measured from December 1, the date the amended judgment was entered. They insist they were misled by the district court because when that court denied the motion to reconsider as untimely and denied

the motion for a new trial without explanation, plaintiffs assumed that the motion to reconsider was timely and had been denied on another ground. Plaintiffs also declare they were misled by the district court clerk's office because the Rule 77(d) notice, which stated that the notice of appeal needed to be filed by December 30, led them to believe their time for filing an appeal and motions was restarted; and, also because on December 17, 1997 a deputy clerk read the orders and docket entries over the telephone to an associate of the law firm representing plaintiffs and assured her that the trial judge deemed the Rule 59 motion timely. The associate stated in an affidavit that if both motions had been denied as untimely, she would have filed the notice of appeal within 30 days of the November 26 judgment.

Yet, in our view, this case fails to present the kind of unique circumstances necessary to excuse the untimely filing of appellants' notice of appeal. The failure to receive a Rule 77(d) notice does not affect a party's time to appeal or permit a court to relieve a party of its failure to timely appeal. See Bortugno v. Metro-North Commuter R.R., 905 F .2d 674, 676 (2d Cir . 1990); see also Fed. R. Civ. P. 77(d) . Further, we have never held that a party may rely on the Rule 77(d) notice it receives to restart its time to appeal, and we decline to do so here. Similarly, appellants could not rely on the assumption they drew based on their readings of "denied" versus "denied as untimely," the wording used by the district court to decide two motions filed on the same day. The word "denied" implies nothing regarding the timeliness of the motion for a new trial, and appellants are not free to interpret it in their favor.

With regard to the oral communication with the clerk's office, such statements by a member of the clerk's office staff are not official judicial assurances that qualify as unique circumstances. "Judicial officer" means a judge or a member of a judge's staff empowered to speak in the judge's behalf. See, e.g., Moore v South Carolina Labor Bd, 100 F.3d 162, 164 (D.C. Cir. 1996) (statements by clerk's office staff may constitute "specific assurances," but are not "official judicial action"); (United States v. Heller, 957 F.2d 26, 29 (lst Cir. 1992) (rejecting

claim of unique circumstances on the basis that "'judicial officer' in this context. . . mean[s] a judge, not an employee in the office of the clerk") ; Sonicraft. Inc. v. NLRB, 814 F.2d 385, 387 (7th Cir. 1987) (no unique circumstances where clerk's office employee mistakenly told counsel that petition mailed, rather than received, in 30 days would be timely) .

Although it may appear at first blush that the Tenth and Eleventh Circuits have applied the unique circumstances doctrine to allow appeals to proceed in similar situations, those cases are distinguishable because the assurances received from the clerk's offices related to truly clerical matters falling within the direct responsibility of those offices. See Woods v. WalMart, 124 F.3d 219, 1997 WL 527668, at *2 (10th Cir. 1997) (unpublished) (statement by clerk's office personnel regarding whether a particular judgment had been entered) ; Willis v. Newsome, 747 F.2d 605, 606 (11th Cir. 1984) (assurances about clerk's office's "local custom" and practice for stamping notices of appeal).

Here, the assurances appellants maintain they received deal not with clerical matters, but with the substance of the order itself and the basis for the district court's decision on the motion for a new trial. The clerk's office of course might not accurately interpret a judge's order, and parties should not rely on such sources to construe an order. As a consequence, appellants fail to satisfy the requirements to establish unique circumstances to excuse their untimely filing of this appeal.

CONCLUSION

For the foregoing reasons, this appeal is dismissed as untimely.

EXHIBIT B

BEST AVAILABLE COPY

A13

APPENDIX B

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING RESPONDENT'S MOTION TO DISMISS THE APPEAL

T 1080
8/97

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Each motion must be accompanied by a supporting affidavit. (Local Rule 27(a))

98-7060
Docket Number

REZZONICO v. H&R BLOCK

ORIGINAL

NOTICE OF MOTION

Use short title

for dismissal of appeal as untimely

MOTION BY: (*Name, address and tel. no. of law firm and of attorney in charge of case*)

Peter J. Klarfeld
WILEY, REIN & FIELDING
1776 K Street, NW
Washington, DC 20006 (202) 429-7006

OPPOSING COUNSEL: (*Name, address and tel. no. of law firm and of attorney in charge of case*)

Norman A. Olch
233 Broadway
New York, NY 10279 (212) 964-6171

Has consent of opposing counsel:

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

A. been sought? ☒ Yes ☐ No
B. been obtained? ☐ Yes ☒ No

Has request for relief been made below? ☐ Yes ☐ No
(*See F.R.A.P. Rule 8.*)

Has service been effected? ☒ Yes ☐ No
Is oral argument desired? ☒ Yes ☐ No
(*Substantive motions only*)

Would expedited appeal eliminate need for this motion? ☐ Yes ☐ No
If so, explain why not:

Requested return date: March 10, 1998
(*See Second Circuit Rule 27(b).*)

Has argument date of appeal been set:
A. by scheduling order? ☒ Yes ☐ No
B. by firm date/argument notice? ☐ Yes ☒ No
C. If yes, enter date:

Will the parties agree to maintain the status quo until the motion is heard? ☐ Yes ☐ No

Judge or agency whose order is being appealed: Honorable J. Garvan Murtha, District of Vermont
Brief statement of the relief requested: (*Complete, also, Page 2 of this form.*)

Appellees seek dismissal of the appeal on the ground that the Notice Of Appeal was not filed within 30 days of entry of Judgment.

By: (*Signature of Attorney*)
Signed name must be printed blowdrk
Peter J. Klarfeld
Date: 2/20/98
(application for admission pending)

Appearing for: (*Name of Party*)
H&R Block, Inc., H&R Block Eastern Tax Services, Inc., and HRB Royalty, Inc.
Appellant or Petitioner: ☐ Plaintiff ☐ Defendant
Appellee or Respondent: ☐ Plaintiff ☒ Defendant

ORDER

(Clerk to leave this space blank.) BEFORE: FEINBERG, CALABRESI, CJJ and SEYBERT, DJ.

IT IS HEREBY ORDERED that the motion be and it hereby is granted denied.

MAR 24 1998

FOR THE COURT
GEORGE LANGE III, Clerk
By: [illegible]
[illegible], Deputy

March 24, 1998
Date

(Clerk/Judge(s))

EXHIBIT C

APPENDIX C

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITIONERS' MOTION FOR A REHEARING

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT. HOUSE
40 FOLEY SQUARE
NEW YORK 10007

DC: BBVT
DC Docket: 94-cv-60
DC Judge: MURTHA

KAREN GREVE MILTON
ACTING CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 29th day of September one thousand nine hundred and ninety-nine.

John Rezzonico and Jaquelyn Rezzonico
Defendant-Plaintiff -Counterclaim-Defendant-Appellant,

v. **Dkt No: 98-7060**

H & R Block, Inc., and H & R Block Eastern Tax Services, Inc.,
Defendant -CounterClaim-Plaintiff-Appellee,

HRB Royalty, Inc., add as party from consolidated case ,
Plaintiff.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant John and Jacquelyn Rezzonico

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon .

FOR THE COURT
KAREN GREVE MILTON, Acting Clerk

By:_____
Beth J. Meador,
Administrative Attorney

p o ccc
inbancdn_frm

EXHIBIT D

APPENDIX D

FEDERAL RULE OF CIVIL PROCEDURE 6 (a)

Rule 6. Time

(a) Computation. In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, or, when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the office of the clerk of the district court inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days. When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this rule and in Rule 77(c), "legal holiday" includes New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States, or by the state in which the district court is held.

EXHIBIT E

APPENDIX E

FEDERAL RULE OF CIVIL PROCEDURE 59(b)

(b) Time for Motion. Any motion for a new trial shall be filed no later than 10 days after entry of the Judgment.

EXHIBIT F

APPENDIX F

FEDERAL RULE OF CIVIL PROCEDURE 77(c)

(c) Clerk's Office and Orders by Clerk. The clerk's office with the clerk or a deputy in attendance shall be open during business hours on all days except Saturdays, Sundays, and legal holidays, but a district court may provide by local rule or order that its clerk's office shall be open for specified hours on Saturdays or particular legal holidays other than New Year's Day, Birthday of Martin Luther King, Jr, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, and Christmas Day. All motions and applications in the clerk's office for issuing mesne process, for issuing final process to enforce and execute judgments, for entering defaults or judgments by default, and for other proceedings which do not require allowance or order of the court are grantable of course by the clerk; but the clerk's action may be suspended or altered or rescinded by the court upon cause shown.

EXHIBIT G

APPENDIX G

FEDERAL RULE OF CIVIL PROCEDURE 77(d)

(d) Notice of Orders or Judgments. Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon each party who is not in default for failure to appear, and shall make a note in the docket of the mailing. Any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers. Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 4(a) of the Federal Rules of Appellate Procedure.

EXHIBIT H

APPENDIX H

FEDERAL RULE OF THE APPELLATE PROCEDURE 4(a) (1) (A)

(a) Appeal in a Civil Case.

(1) Time for Filing a Notice of Appeal.

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

EXHIBIT I

APPENDIX I

FEDERAL RULE OF APPELLATE PROCEDURE 4(a)(4)(A)(v)

(4) Effect of a Motion on a Notice of Appeal.

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

...

(v) for a new trial under Rule 59;

EXHIBIT J

APPENDIX J

FEDERAL RULE OF APPELLATE PROCEDURE 4(a) (6)

(6) Reopening the Time to File an Appeal. The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all thefollowing conditions are satisfied;

(A) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives notice of the entry, whichever is earlier;

(B) the court finds that the moving party was entitled to notice of entry of the judgment or order sought to be appealed but did not receive the notice from the district Court or any party within 21 days after entry; and

(C) the Court finds that no party would be prejudiced.

EXHIBIT K

BEST AVAILABLE COPY

APPENDIX K

SECOND CIRCUIT LOCAL RULE 27 (i)

(i) Suggestions for In Banc Consideration of a Motion. A suggestion by a party for in banc consideration in the first instance of a motion shall not be accepted for filing by the clerk unless the motion sought to be considered in banc has previously been ruled on by a panel of this court.

Supreme Court, U.S.
FILED
JAN 28 2000
CLERK

No. 99-1093

IN THE

Supreme Court of the United States

JOHN REZZONICO and JACQUELYN REZZONICO,

Petitioners,

v.

H & R BLOCK, INC., H & R BLOCK EASTERN TAX SERVICES, INC., and HRB ROYALTY, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

PETER J. KLARFELD
Counsel of Record
TIMOTHY J. SIMEONE
WILEY, REIN & FIELDING
Attorneys for Respondents
1776 K Street, N.W.
Washington, DC 20006
(202) 719-7000

157556

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

BEST AVAILABLE COPY

STATEMENT OF CORPORATE AFFILIATION PURSUANT TO RULE 29.6

Respondent H&R Block, Inc. is the indirect corporate parent of Respondents H&R Block Eastern Tax Services, Inc. and HRB Royalty, Inc. No other publicly held company owns 10% or more of the stock of any of the respondents.

TABLE OF CONTENTS

	Page
Statement of Corporate Affiliation Pursuant to Rule 29.6	i
Table of Contents	ii
Table of Cited Authorities	iv
Table of Appendices	vii
Introduction	1
Statement of the Case	1
Reasons for Denying the Writ	5
1. This Case Does Not Present A Split In The Circuits On Whether A Litigant Can Rely On A Notice Pursuant To Fed. R. Civ. P. 77(d), And The Issue Addressed Below Does Not Warrant This Court's Consideration.	5
2. This Case Does Not Present A Split In the Circuits On Whether Reliance On A Misleading Rule 77(d) Notice Constitutes "Unique Circumstances."	9
3. The Question Whether The "Law Of The Case" Doctrine Applies To Jurisdictional Determinations Of Circuit Courts Is Not Properly Presented Here, And This Case Does Not Merit This Court's Review.	12

Contents

Page

A. The Petitioners Ignore The Primary Bases For The Second Circuit's Decision. 13

B. The "Circuit Split" Cited By The Petitioners Is Irrelevant, And No Split Exists On The Relevant Issue. 14

C. Even If The Circuits Differed In Applying The Law Of The Case Doctrine To Motions Panel Decisions, The Decision Below Would Not Warrant This Court's Review. 17

D. The Petitioners' Additional Arguments In Favor Of Review Are Meritless. ... 18

Conclusion 20

TABLE OF CITED AUTHORITIES

Page

Cases:

American Federation of Grain Millers v. Cargill, Inc., 15 F.3d 726 (7th Cir. 1994) 7

American Methyl Corp. v. EPA, 749 F.2d 826 (D.C. Cir. 1984) 16

Asarco, Inc. v. FERC, 777 F.2d 764 (D.C. Cir. 1985) 15

Association of Investment Brokers v. SEC, 676 F.2d 857 (D.C. Cir. 1982) 16

Browder v. Director, Ill. Dept. of Corrections, 434 U.S. 257 (1978) 8

DiLaura v. Power Authority of New York, 982 F.2d 73 (2d Cir. 1992) 17

EEOC v. Neches Butane Products Co., 704 F.2d 144 (5th Cir. 1983) 18

FTC v. Minneapolis-Honeywell Co., 344 U.S. 206 (1952) 7, 8, 9

Hollins v. Department of Corrections, 191 F.3d 1324 (11th Cir. 1999) 5, 9, 10

Cited Authorities

	Page
In Re Slimick, 928 F.2d 304 (9th Cir. 1990)	9
Kraus v. Consolidated Rail Corp., 899 F.2d 1360 (3d Cir. 1990)	10
LaShawn v. Barry, 87 F.3d 1389 (D.C. Cir. 1996)	16
McCuen v. American Casualty Co., 946 F.2d 1401 (8th Cir. 1991)	15
Messenger v. Anderson, 225 U.S. 436 (1912)	17
MGIC Indem. Corp. v. Weisman, 803 F.2d 500 (9th Cir. 1986)	5
Neu Cheese Co. v. FDIC, 825 F.2d 1270 (8th Cir. 1987)	5
Northwest Airlines, Inc. v. FAA, 675 F.2d 1303 (D.C. Cir. 1982)	16
Osterneck v. Ernst & Whinney, 489 U.S. 169 (1989)	10
Pinion v. Dow Chemical, 928 F.2d 1522 (11th Cir. 1991)	10
Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership, 507 U.S. 380 (1993)	8
Prudential-Bache Securities, Inc. v. Fitch, 966 F.2d 981 (5th Cir. 1992)	5, 9

Cited Authorities

	Page
Research Equity Fund, Inc. v. Insurance Co. of North America, 597 F.2d 1266 (9th Cir. 1979)	12
Stifel, Nicolaus & Co., Inc., v. Woolsey & Co., Inc., 81 F.3d 1540 (10th Cir. 1996)	15
Taylor v. FDIC, 132 F.3d 753 (D.C. Cir. 1997)	16
United States v. Ibarra, 502 U.S. 1 (1991)	8
West v. United States, 222 F.2d 774 (D.C. Cir. 1954)	5
Wilmer v. Board of County Comm'rs, 69 F.3d 406 (10th Cir. 1995)	15
Rules:	
Federal Rule of Appellate Procedure 4(a)(1)	8
Federal Rule of Appellate Procedure 4(a)(5)	8
Federal Rule of Bankruptcy Procedure 9006	8
Federal Rule of Civil Procedure 59	3, 4, 7, 9, 11
Federal Rule of Civil Procedure 60(a)	7
Federal Rule of Civil Procedure 77(d)	1, 2, 3, 5, 6, 7, 9, 11
Second Circuit Local Rule 27	4
Second Circuit Local Rule 27(i)	18, 19, 20

TABLE OF APPENDICES

Page

Appendix A — Notice To Litigants Of The United States District Court For The District Of Vermont Dated November 26, 1997 ..... 1a

Appendix B — Notice To Litigants Of The United States District Court For The District Of Vermont Dated December 1, 1997 ..... 3a

Appendix C — Excerpts Of Docket Entries 5a

Appendix D — Affidavit Of Peter Welch Dated March 2, 1998 ..... 6a

INTRODUCTION

The three "questions presented" by the petitioners share a fatal flaw: each is premised on a misperception or mischaracterization of the holdings below. The Second Circuit did not hold that a litigant cannot rely on the accuracy of a Rule 77(d) notice with respect to the factual information that notice is intended to convey, *i.e.* the date of entry of a judgment or order. It held that the failure to file a timely notice of appeal was not excused where a Rule 77(d) notice was accurate in that regard, but the appellants claimed that their counsel was otherwise misled as to the legal question of when their notice of appeal was due. The Second Circuit also did not hold that the law of the case doctrine does not apply to an appellate court's prior jurisdictional holdings. It held that that doctrine, which is discretionary to begin with, does not bar an appellate merits panel from reconsidering a decision by an earlier motions panel.

The Second Circuit's actual holdings are not only correct but uncontroversial. Only by severely contorting the lower court's rulings are the petitioners able to manufacture the "circuit splits" alleged in the Petition. As set forth in detail below, the petitioners' artfully crafted questions are not "presented" by this case, which involves only factbound determinations implicating no genuine circuit split. The Petition therefore does not merit this Court's review.

STATEMENT OF THE CASE

This petition arises out of an erroneous legal conclusion by the petitioners' counsel as to when the petitioners' notice of appeal was due. A Judgment against the petitioners was entered on November 26, 1997. A copy of the Judgment was

promptly sent to the petitioners along with a notice from the clerk of the district court, pursuant to Fed. R. Civ. P. 77(d), accurately advising the petitioners of the date on which the Judgment had been entered on the docket. Opposition Appendix ("Opp. App.") A at 2a. The form notice also stated that the petitioners' appeal must be filed within 30 days of the "judgment or order", *i.e.*, that their appeal had to be filed by December 29, 1997. *Id.* at 1a-2a.

On December 1, 1997, an Amended Judgment was entered. A form Rule 77(d) notice was again promptly sent to the petitioners accurately advising them of the date on which the Amended Judgment had been entered on the docket. Opp. App. B at 4a. The second form notice also stated that the petitioners had 30 days to appeal the "judgment or order," *i.e.*, that an appeal had to be filed by December 30, 1997. *Id.* at 3a-4a.

Each of the Rule 77(d) notices was accompanied by a copy of the judgment to which the notice referred: the notice of November 26, 1997 by a copy of the original Judgment of November 26, 1997, and the notice of December 1, 1997 by a copy of the Amended Judgment of December 1, 1997. Opp. App. D at 6a-7a. Thus, there could be no misunderstanding as to the "judgment or order" to which each notice referred. Moreover, the docket entry reflecting the entry of the Amended Judgment on December 1, 1997 expressly stated that the Amended Judgment had been entered to "correct clerical error." Opp. App. C at 5a.[1]

1. The word "not" had been inadvertently dropped in transcribing the district court's final order for relief into the original Judgment. Although the import of the Judgment was clear despite the error, the missing word was re-inserted in the Amended Judgment.

In an affidavit submitted to the Second Circuit by Peter Welch, the petitioners' counsel in the district court, Mr. Welch stated that "based on the second Rule 77(d) notice, *and on the nature of the change made in the Amended Judgment*" (emphasis added), he concluded that the petitioners' motion for a new trial was required to be filed within 10 days of the December 1, 1997 Amended Judgment, rather than within 10 days of the November 26, 1997 underlying Judgment. Opp. App. D at 7a. The Rule 77(d) notice accompanying the December 1, 1997 Amended Judgment made no reference to the time within which the petitioners were required to file a Rule 59 motion. Opp. App. B.

On December 15, 1997, more than 10 days after the November 26 Judgment, the petitioners filed two motions, one for reconsideration of the district court's "Judgment Order" and the second for a new trial.[2] On December 16, 1997, the district court denied both of those motions. The district court's order stated that the motion for reconsideration was denied as untimely because it was, in essence, a motion to reconsider the court's grant of summary judgment, which had been entered eight months earlier. The motion for a new trial was simply marked "denied."

On December 17, 1997, one of Mr. Welch's associates called the deputy clerk of the district court to inquire about the status of the petitioners' motions. She was advised that both had been denied. She claims she was also told that the motion for reconsideration was denied as untimely, and that the judge considered the motion for a new trial timely but

2. Since the district court had granted summary judgment on all claims in the matter, there had been no trial. It is therefore unclear to what the petitioners' motion for a "new trial" referred.

had denied it on the merits. Pet. at 2-3. The associate then asked that the full text of both orders be read to her over the telephone so that she could "be certain," and the deputy clerk read the orders as requested. Pet. at 3. The petitioners filed their notice of appeal on January 13, 1998, well over 30 days after the entry of Judgment on November 26, 1997.

The respondents moved to dismiss the appeal on the grounds that (1) the entry of an Amended Judgment to correct a clerical error did not restart the time for the petitioners to file a notice of appeal going to the merits of the underlying Judgment or their time to file a Rule 59 motion, (2) the petitioners' Rule 59 motion was therefore untimely, and (3) the petitioners' notice of appeal was therefore likewise untimely.

A motions panel of the Second Circuit denied the motion. Second Circuit motions procedures do not provide for the filing of reply briefs. Second Circuit Local Rule 27. Although the respondents filed a motion for leave to file a reply brief (along with a copy of their proposed brief), that motion was not granted until the morning of argument of the motion. The parties were allotted a total of five minutes, divided equally, to argue the motion. The motion was denied from the bench, without opinion.

The parties then briefed the case on the merits. In response to the jurisdictional statement contained in the petitioners' brief on the merits, the respondents again briefed the untimeliness of the notice of appeal and suggested that the court lacked jurisdiction. After oral argument before the merits panel, which was devoted almost entirely to the jurisdictional issue, the merits panel dismissed the appeal for lack of jurisdiction.

REASONS FOR DENYING THE WRIT

1. This Case Does Not Present A Split In The Circuits On Whether A Litigant Can Rely On A Notice Pursuant To Fed. R. Civ. P. 77(d), And The Issue Addressed Below Does Not Warrant This Court's Consideration.

The petitioners' argument that this case creates a split in the circuits regarding whether parties may properly rely on a Rule 77(d) notice rests on a misperception or mischaracterization of the Second Circuit's holding. This case does not create such a split.

It is true that a number of circuits have viewed reliance on inaccurate *factual* or *clerical* information received in an official communication from a district court clerk's office as sufficient to excuse the untimely filing of a notice of appeal. Every case cited by the petitioners deals with information of that nature.[3] Contrary to the petitioners' suggestion, however, the court below did not reject this view. In fact, it indicated that, were those circumstances presented,

3. *See Hollins v. Department of Corrections*, 191 F.3d 1324 (11th Cir. 1999) (clerk's failure to enter judgment on the court's "officially" sanctioned PACER electronic docketing system); *Prudential-Bache Securities, Inc. v. Fitch*, 966 F.2d 981 (5th Cir. 1992) (order denying Rule 59 motion stamped with the wrong entry date); *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500 (9th Cir. 1986) (clerk whited-out original docket date and inserted later docket date); *West v. United States*, 222 F.2d 774 (D.C. Cir. 1954) (prisoner pursuing *in forma pauperis* representation reasonably understood date on clerk's letter advising of denial of motion to be date of denial); *Neu Cheese Co. v. FDIC*, 825 F.2d 1270 (8th Cir. 1987) (clerk agreed to file premature notice at the time it was proper, and did so; timely filing accomplished through agency of the clerk).

it might consider such an approach (Petition Appendix ("Pet. App.") at A12):

> Although it may appear at first blush that the Tenth and Eleventh Circuits have applied the unique circumstances doctrine to allow appeals to proceed in similar situations, those cases are distinguishable because the assurances received from the clerk's offices related to truly clerical matters falling within the direct responsibility of those offices. *See Woods v. WalMart*, 124 F.3d 219, 1997 WL 527668, at *2 (10th Cir. 1997) (unpublished) (statement by clerk's office personnel regarding whether a particular judgment had been entered); *Willis v. Newsome*, 747 F.2d 605, 606 (11th Cir. 1984) (assurances about clerk's office's "local custom" and practice for stamping notices of appeal).

Here, in contrast, there is no dispute that the petitioners received accurate, timely clerical information as to when the Judgment and the Amended Judgment were entered on the docket, and as to the basis for the entry of the Amended Judgment, *i.e.*, "to correct clerical error." Opp. App. C at 5a.

What the petitioners argue here is that the Rule 77(d) notice accompanying the Amended Judgment misled them as to a *legal* issue — when they were required to file a notice of appeal. In his affidavit to the Second Circuit, the petitioners' trial counsel stated that, based on the statement in the second notice that an appeal had to be filed within 30 days and his own assessment of the nature of the amendment, he concluded that the petitioners' time to appeal the merits

of the initial Judgment had been restarted. Opp. App. D at 7a.[4] From that conclusion — a legal conclusion flatly at odds with this Court's holding in *FTC v. Minneapolis-Honeywell Co.*, 344 U.S. 206 (1952) — he reasoned that if the petitioners' time to appeal had been restarted, their time to file a Rule 59 motion must have been restarted as well.[5]

The Second Circuit found *that* purported reliance — reliance not on factual or clerical information contained in a Rule 77(d) notice, but on what the petitioners' counsel took as legal advice from the clerk, which he then filtered through

---

4. The significance of the petitioners' counsel having made an independent assessment of the "nature of the change" is that, quite apart from any purported reliance on legal advice from the clerk's office, he mistakenly concluded that the change represented a substantive amendment of the Judgment which restarted the petitioners' time to file their notice of appeal. The petitioners, in fact, argued that position below. Pet. App. at A8-9. The Second Circuit found that argument meritless in view of (1) the docket's express statement that the Judgment had been amended to correct a "clerical error," (2) the express terms of the district court's order for entry of final judgment, and (3) the monetary award reflected in the Judgment. Pet. App. at A3, A9-10. The petitioners do not attempt to reargue their position here and appear to have abandoned it.

5. The petitioners' counsel apparently did not consider the possibility that the second Rule 77(d) notice conveyed the accurate (if non-clerical) information that the petitioners had 30 days in which to appeal the issues appealable as the result of the entry of the Amended Judgment, *i.e.* the propriety of the clerical correction, *see, e.g.*, *American Federation of Grain Millers v. Cargill, Inc.*, 15 F.3d 726, 727-28 (7th Cir. 1994) (appeal of an order granting Rule 60(a) relief does not implicate the issues involved in the underlying judgment), rather than the plainly inaccurate legal conclusion that the petitioners' time to appeal the merits of the underlying Judgment had been restarted.

his own independent legal analysis — insufficient to excuse the filing of an untimely appeal. Pet. App. at A11. We know of no circuit that has reached a contrary conclusion.

Finally, the petitioners cite two decisions of this Court to suggest that the issue they tender is worthy of consideration. Neither is apposite. This Court's decision in *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993), provided guidance regarding application of the "excusable neglect" standard imposed by Rule 9006 of the Federal Rules of Bankruptcy Procedure. It is simply not applicable to the "mandatory and jurisdictional" filing requirement imposed by Fed. R. App. P. 4(a)(1). *See Browder v. Director, Ill. Dept. of Corrections*, 434 U.S. 257 (1978).[6]

The petitioners' citation of *United States v. Ibarra*, 502 U.S. 1, 7 (1991), for the proposition that "[l]itigants should not 'be required to guess at their peril the date on which the time to appeal commences to run' " (Pet. at 7) is also off the mark. The teaching of *Ibarra* is that certainty is promoted by adhering to general rules, not by creating nebulous exceptions. 502 U.S. at 7. Moreover, the petitioners here were not required to guess when their notice of appeal was due. First, their counsel was accurately and timely advised of the dates on which the original and amended judgments were entered and of the reason for the amendment of the judgment. In those circumstances, the rulings of this Court were clear as to the time within which the petitioners could file their notice of appeal of the underlying judgment. *FTC v.*

6. There is an express avenue by which a failure to file a timely notice of appeal owing to "excusable neglect" can be pursued for a certain period before the district court. Fed. R. App. P. 4(a)(5). The petitioners here did not pursue it.

Minneapolis-Honeywell Co. Second, if they had any doubt, the petitioners could have sought guidance from the district judge. *See In Re Slimick*, 928 F.2d 304, 310 (9th Cir. 1990) ("If a party believes a court has acted ambiguously as to an appeal deadline, it bears the burden of seeking clarification"). Third, the petitioners learned on December 17, 1997 that their Rule 59 motion had been denied. Pet. at 2-3. Even under the most unfavorable interpretation of events, their notice of appeal of the underlying Judgment was not due until December 29, 1997. They could simply have filed their notice any time during those 12 days.

In sum, none of the cases cited by the petitioners addresses purported reliance by a lawyer on a legal conclusion contained in a Rule 77(d) notice, much less a legal conclusion which the lawyer then subjected to his own independent analysis. That was the issue before the court below. Its decision creates no split in the circuits and does not warrant this Court's consideration.

2. This Case Does Not Present A Split In the Circuits On Whether Reliance On A Misleading Rule 77(d) Notice Constitutes "Unique Circumstances."

This issue is, in essence, the same issue raised in Question 1.[7] It does not warrant the Court's consideration for the same reasons discussed above.

---

7. The issue whether a litigant can rely on a Rule 77(d) notice, which is the focus of Question 1, arises only if the information contained in the notice is "incorrect or misleading," the focus of Question 2. Moreover, the principal circuit court cases relied on by the petitioners in their discussion of Question 1 — *Hollins* and *Prudential-Bache* — are cases decided under the "unique (Cont'd)

No case cited by the petitioners — and no case of which we are aware — has found the "unique circumstances" standard met where a lawyer, fully informed of the facts which determine his client's time to appeal, purportedly relied on misleading (or misunderstood) legal advice from a clerk's office together with the lawyer's own mistaken legal assessment. Indeed, in *Pinion v. Dow Chemical*, 928 F.2d 1522, 1533 (11th Cir. 1991), the court stated (*quoting Kraus v. Consolidated Rail Corp.*, 899 F.2d 1360, 1365-66 (3d Cir. 1990)):

> The unique circumstances doctrine has never been extended to an attorney's miscalculation of the applicable time limits, and we see no reason to do so here even if the trial judge also shared that incorrect assumption.

The Eleventh Circuit's opinion in *Hollins*, on which the petitioners rely, is based on *Pinion*. Moreover, numerous cases, including this Court's decision in *Osterneck* itself, make clear that "unique circumstances" will not be found where counsel fails to "seek assurance" from the court in the face of ambiguous information. *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 178-79 (1989); *Pinion*, 928 F.2d at 1533. Again, no case cited by the petitioners is to the contrary.[8]

(Cont'd)
circumstances" doctrine. The others preceded this Court's decision in *Osterneck v. Ernst & Whinney*, 489 U.S. 169 (1989), which redefined the "unique circumstances" standard. Indeed, in the conclusion to their petition, the petitioners request review only of Question 1 and Question 3.

8. The petitioners suggest that it is somehow helpful to their cause that the *respondents* "made no complaint to the clerk or to the (Cont'd)

Moreover, the "specific assurance" element of the "unique circumstances" doctrine imposes a high and fundamentally fact-driven standard. Here, the Second Circuit concluded that none of the facts upon which the petitioners relied — the wording of the second Rule 77(d) notice, the District Judge's denial of the petitioners' Rule 59 motion without elaboration, and a deputy clerk's purported statement that the judge viewed the petitioners' Rule 59 motion as timely — met that standard, alone or in the aggregate. Again, the Second Circuit did not hold that no action by a district court clerk's office could ever constitute the "specific assurance" required under the doctrine — it held that *these* actions did not (Pet. App. at A12):

> Here, the assurances appellants maintain they received deal not with clerical matters, but with the substance of the order itself and the basis for the district court's decision on the motion for a new trial. The clerk's office of course might not accurately interpret a judge's order, and parties should not rely on such sources to construe an order. As a consequence, appellants fail to satisfy the requirements to establish unique circumstances to excuse their untimely filing of this appeal.[9]

(Cont'd)
District Judge that the second Rule 77(d) notice was erroneous." Pet. at 8. The respondents did not, and do not, view any portion of the second notice as "erroneous" or misleading. A fair reading of the notice, in the context of this Court's holdings on the subject, indicated that the petitioners had 30 days from entry of the Amended Judgment to file an appeal addressing the propriety of the amendment. Moreover, it was the petitioners' responsibility to determine when their notice of appeal was due, not the respondents'.

9. In discussing the petitioners' claim that they received purported oral assurances from a deputy clerk, the court below stated (Cont'd)

In short, while the clerk may be the "ultimate authority regarding entries on the court's docket," Pet. at 8, quoting *Research Equity Fund, Inc. v. Insurance Co. of North America*, 597 F.2d 1266, 1267 (9th Cir. 1979), the clerk is not the ultimate authority regarding appellate procedural law. That is counsel's responsibility. The petitioners cite no case holding that a lawyer may rely on a district court clerk's purported legal advice — particularly advice which the lawyer then subjects to his own independent analysis. That was the issue before the court below. Its decision that those facts do not satisfy the "unique circumstances" doctrine does not create a split in the circuits and does not warrant this Court's consideration.

3. The Question Whether The "Law Of The Case" Doctrine Applies To Jurisdictional Determinations Of Circuit Courts Is Not Properly Presented Here, And This Case Does Not Merit This Court's Review.

The petitioners' final "question presented" — whether the "law of the case" doctrine applies to jurisdictional determinations of circuit courts — also does not merit this Court's review. Like the other issues raised by the petitioners, this question is not truly "presented" by the lower court's decision. Contrary to the petitioners' suggestion, the Second Circuit did not base its refusal to apply the law of the case

---

(Cont'd)
that such statements are not "official judicial assurances that qualify as unique circumstances." Pet. App. at A11. The petitioners themselves appear to concede the wisdom of that position with respect to alleged oral assurances. Pet. at 5-6. Nonetheless, the Second Circuit, as quoted above, ultimately distinguished, rather than rejected, the decisions of other circuits taking a contrary position. Pet. App. at A11.

doctrine on the ground that the ruling at issue was "jurisdictional." Rather, the court found reexamination of the motions panel's decision proper primarily because the discretionary doctrine of law of the case does not necessarily bind an appellate court even as to a final order, and is "even less binding" in the context of an interlocutory order issued by a motions panel. Pet. App. at A6.

The alleged "circuit split" cited by the petitioners is thus irrelevant here. Regardless of whether an appellate court may reconsider a merits panel's decision on the ground that the question at issue is "jurisdictional," the rule that a merits panel may properly revisit an interlocutory determination by a motions panel is widely accepted among the circuits. Moreover, even were the circuits to differ on this issue, it would not merit this Court's review. Not only is the law of the case doctrine discretionary — and thus subject to differences in application — but the degree of deference to be accorded to motions panel decisions by merits panels of a particular circuit is a matter of intra-circuit housekeeping. Variations among the circuits in the allocation of authority between motions and merits panels, like inter-circuit differences in the role of motions panels generally, present no occasion for this Court's review.

A. The Petitioners Ignore The Primary Bases For The Second Circuit's Decision.

The petitioners' "question presented" focuses on whether "the law of the case applies to the jurisdictional determinations of a panel of a Circuit Court." Pet. at 9. This question simply ignores the merits panel's primary justifications for revisiting the motions panel's decision regarding jurisdiction (Pet. App. at A6-7):

> First, . . . the law of the case doctrine is discretionary, not mandatory. The doctrine expresses, in shorthand fashion, a practice of the courts generally not to reconsider that which has already been decided. But it does not purport to be a legally binding limitation on the court's authority to reconsider such matters. Second, a motions panel's decision is based on an abbreviated record and made without the benefit of full briefing by the parties, which may result in a less than thorough exploration of the issues.

Thus, the Second Circuit's reexamination of the motions panel's decision was based on its view that "[b]ecause law of the case doesn't bind an appellate court even as to final orders, it follows that the doctrine is even less binding in the context of interlocutory [motions panel] orders." *Id.* at A6. The jurisdictional nature of the disputed issue, the court observed, only rendered reexamination "especially important." *Id.* at A7.

As a result, the petitioners' "question presented" regarding law of the case does not merit review in the context of this petition. The ruling of the court below was that the doctrine of law of the case does not bar merits panel review of an interlocutory decision by a motions panel. The petitioners' "question presented" does not even address that ruling.

B. The "Circuit Split" Cited By The Petitioners Is Irrelevant, And No Split Exists On The Relevant Issue.

The petitioners' contention that "the Circuit courts are divided over the question of whether the law of the case

applies to the jurisdictional determinations of a panel of a Circuit Court" (Pet. at 9) is irrelevant here. No significant split exists as to the question actually decided by the Second Circuit: whether a merits panel may properly review the holding of a motions panel.

Indeed, decisions of two circuits cited by the petitioners as creating the alleged "split" were properly cited by the Second Circuit in support of its decision. In *Stifel, Nicolaus & Co., Inc., v. Woolsey & Co., Inc.*, 81 F.3d 1540 (10th Cir. 1996), the Tenth Circuit expressly held that "an appeals court may review a prior motions panel's decision uninhibited by the law of the case doctrine." *Id.* at 1544 (citing cases).[10] Similarly, in *McCuen v. American Casualty Co.*, 946 F.2d 1401, 1403 (8th Cir. 1991), a case cited by the petitioners, the Eighth Circuit observed that it was "not to be doubted" that the court had the power, at the merits stage of the case, to "re-examine" its earlier ruling on a motion to dismiss. These circuits thus follow the same rule the Second Circuit did here.

The petitioners also claim that the decision below is inconsistent with the law of the D.C. Circuit. In doing so, however, the petitioners simply ignore the vast weight of D.C. Circuit authority to the contrary. *See, e.g., Asarco, Inc. v. FERC*, 777 F.2d 764, 773 n.6 (D.C. Cir. 1985) ("The disposition of a motions panel may of course be reexamined

---

10. *Wilmer v. Board of County Comm'rs*, 69 F.3d 406 (10th Cir. 1995), the Tenth Circuit decision upon which the petitioners rely, is not to the contrary. It discussed the propriety of reconsidering an earlier *merits* (not *motions*) panel decision, and held only that it need not definitively decide that question because the disputed issue had not been "actually resolved on the merits" by the earlier decision.

during the merits panel's in-depth consideration of the case."); *American Methyl Corp. v. EPA*, 749 F.2d 826, 832 (D.C. Cir. 1984) ("There is no theoretical obstacle to our reconsidering the motions panel decision. . . ."); *Northwest Airlines, Inc. v. FAA*, 675 F.2d 1303, 1308 (D.C. Cir. 1982) (reversing a motions panel's decision); *Association of Investment Brokers v. SEC*, 676 F.2d 857, 863 (D.C. Cir. 1982) (declining to apply law of the case as a bar to reexamining a motions panel decision because "[m]otion papers frequently do not reveal the full dimensions of the question tendered"). The petitioners instead focus on a lone D.C. Circuit case suggesting — in an unilluminating one-paragraph discussion — that the decision of a motions panel of the court is "preclusive for all matters decided expressly or by necessary implication." *Taylor v. FDIC*, 132 F.3d 753, 761 (D.C. Cir. 1997).[11] To the extent that *Taylor* — which, like the petitioners, simply ignored settled circuit law to the contrary — creates any uncertainty regarding the D.C. Circuit's rule governing merits panel reconsideration of motions panel rulings, that uncertainty should be resolved in the first instance by the circuit court itself, not by this Court on a petition for review of a decision from another circuit.

---

11. The petitioners also cite the D.C. Circuit's decision in *LaShawn v. Barry*, 87 F.3d 1389 (D.C. Cir. 1996), but that decision is irrelevant here because it concerns the preclusive effect of a decision by "an earlier [merits] panel in an earlier appeal of the same case," rather than the significance of a motions panel decision.

C. Even If The Circuits Differed In Applying The Law Of The Case Doctrine To Motions Panel Decisions, The Decision Below Would Not Warrant This Court's Review.

Even if there were differences among the circuits on the question of whether a merits panel may properly reexamine an interlocutory ruling of a motions panel, that issue would not merit this Court's review. As the Second Circuit has observed, the law of the case doctrine is "discretionary and does not limit a court's power to reconsider its own decisions prior to final judgment." *DiLaura v. Power Authority of New York*, 982 F.2d 73, 76 (2d Cir. 1992); *see also Messenger v. Anderson*, 225 U.S. 436, 444 (1912) (the law of the case doctrine "merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power") (Holmes, J.). In light of the doctrine's discretionary nature, variations in its application are to be expected, and certainly do not require this Court's review.

Moreover, defining the role of motions panels within a particular circuit is a task for the circuit itself. No federal statute or rule requires the use of motions panels, or establishes the contours of their authority; such matters are generally governed by the circuits' "internal operating procedures." *See, e.g.*, U.S. Ct. Of App. 7th Cir. App. III, IOP 1 (establishing that a panel of two judges may act on certain matters, such as requests for bail, while a panel of three judges is required to dismiss a case on the merits, and all other motions may be entertained by a single judge). A circuit would thus presumably be free to expressly authorize merits panels to review all motions panel decisions, or to expressly prohibit any such review, or, for that matter, to eliminate the use of motions panels altogether. Variations

among the circuits in their treatment of such procedural matters, like variations in circuit rules of procedure generally, do not warrant this Court's review.

D. The Petitioners' Additional Arguments In Favor Of Review Are Meritless.

Finally, the petitioners argue that this Court should grant review because the lower court's decision was "ill-advised" for four reasons. Quite apart from the fact that being "ill-advised" would fall far short of rendering a circuit court decision worthy of certiorari review, the petitioners' arguments are simply meritless.

First, there is no reason to believe that the Second Circuit's reversal of the motions panel decision resulted from the fact that "three different judges [were] sitting." Pet. at 9. Rather, as the court below explained, "a motions panel's decision is based on an abbreviated record and made without the benefit of full briefing by the parties." Pet. App. at A7. "With the benefit of full briefing and (as was the case here) oral argument, the panel to which the case falls for disposition on the merits may conclude that the motions decision was improvident and should be reconsidered." *EEOC v. Neches Butane Products Co.*, 704 F.2d 144, 147 (5th Cir. 1983). That is precisely what happened in this case.

Second, the petitioners' contention that the "procedure followed by the Second Circuit . . . ignore[d] the printed rules of that court," Pet. at 10, is both wrong and irrelevant. It is wrong because Second Circuit Local Rule 27(i) does not prohibit merits panel review of a motions panel decision; it simply states that a party may not request in banc consideration of a motion unless the motion has been ruled

on by a panel of the court. Pet. App. at A23. The petitioners' claim is irrelevant because the question whether a circuit court panel properly followed circuit court rules is a matter to be policed by the circuit itself, not by this Court. Here, not a single judge of the Second Circuit found merit in the petitioners' claim that Rule 27(i) had been contravened, as indicated by the fact that not a single judge requested a vote with respect to in banc review. Pet. App. at A15.

Third, the petitioners maintain that the merits panel's reexamination of the motions panel's decision imposed an "unfair and costly burden on the litigants because it requires them to incur considerable attorneys fees and printing costs to brief the case on the merits." Pet. at 10. However, the petitioners' fees and costs to prepare and print their brief on the merits would have been the same had there been no prior motion and the jurisdictional issue had been raised, as it often is, for the first time before the merits panel. The merits panel would nonetheless have dismissed for lack of jurisdiction.[12] As to any perceived "unfairness," there can be no question that it would be far more "unfair" (not to mention unlawful) for circuit courts to permit cases over which they have no jurisdiction to proceed than it would be to reexamine erroneous motions panel rulings.

Finally, the petitioners' argument that the Second Circuit's rule that a merits panel may review the decision of a motions panel could lead to "constant conflicts within the circuit" is misdirected. Like the petitioners' concern

12. Moreover, the petitioners' briefing of the jurisdictional issue at the motions stage was expressly incorporated by reference into their merits reply brief (Appellants' Reply Brief at 24), thus both utilizing the arguments they had developed at the motions stage and rendering the preparation of the merits brief more economical.

regarding Second Circuit Rule 27(i), this is an argument properly directed to the Second Circuit in banc, not to this Court. Once again, then, it is significant that not a single Second Circuit judge voted to hear the petitioners' claim in banc.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

PETER J. KLARFELD
Counsel of Record
TIMOTHY J. SIMEONE
WILEY, REIN & FIELDING
Attorneys for Respondents
1776 K Street, N.W.
Washington, DC 20006
(202) 719-7000

Dated: January 28, 2000

APPENDIX

APPENDIX A — NOTICE TO LITIGANTS OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT DATED NOVEMBER 26, 1997

UNITED STATES DISTRICT COURT
OFFICE OF THE CLERK
DISTRICT OF VERMONT
FEDERAL BUILDING
BURLINGTON, VERMONT 05402-0945

RICHARD PAUL WASKO
CLERK

* * *

Date 11/26/97

Civil Action No. 1:94-cv-60 and 1:94-cv-116

REZZONICO vs. H&R BLOCK

NOTICE TO LITIGANTS

Pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure as it reads in part . . . "In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals, the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days [60 days if the United States, an officer or an agency is a party] after the date of entry of the judgment or order appealed from."

Appendix A

PLEASE TAKE NOTICE

1. Judgment or Order filed — November 25, 1997

2. Date of Entry of Judgment or or Order on the docket of this court — November 26, 1997

3. Notice of Appeal MUST be filed on or before — December 29, 1997

s/ [illegible]
Deputy Clerk

APPENDIX B — NOTICE TO LITIGANTS OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT DATED DECEMBER 1, 1997

UNITED STATES DISTRICT COURT
OFFICE OF THE CLERK
DISTRICT OF VERMONT
FEDERAL BUILDING
BURLINGTON, VERMONT 05402-0945

RICHARD PAUL WASKO
CLERK

* * *

Date December 1, 1997

Civil Action No. 94-cv-60 & 116

REZZONICO vs. H&R BLOCK

NOTICE TO LITIGANTS

Pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure as it reads in part . . . "In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals, the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days [60 days if the United States, an officer or an agency is a party] after the date of entry of the judgment or order appealed from."

Appendix B

PLEASE TAKE NOTICE

1. Judgment or Order filed — December 1, 1997

2. Date of Entry of Judgment or or Order on the docket of this court — December 1, 1997

3. Notice of Appeal MUST be filed on or before — December 30, 1997

s/ [illegible]
Deputy Clerk

APPENDIX C — EXCERPTS OF DOCKET ENTRIES

Proceedings include all events.
1:94cv60 Rezzonico, et al v. H & R Block, Inc., et al

REFER APPE
CLOSED LEAD
RUTLND

* * *

11/21/97 151 ORDER granting [139-1] motion for entry of final judgment (Chief Judge J. G. Murtha) Cy to parties (wjf)

11/26/97 152 MOTION with memorandum in support by plaintiff Jacquelyn Rezzonico, plaintiff John Rezzonico for a Stay of Non-Compete Injunction during the 10 day post-judgment period and pending appeal (amn)

11/26/97 153 JUDGMENT (Chief Judge J. G. Murtha) for H&R Block Eastern, H & R Block, Inc. against Jacquelyn Rezzonico, John Rezzonico for $750,142 at 5.42% interest plus injunctive relief, case closed Cy to parties Notice to Litigants — Appeal to be filed by 12/29/97. Exhibits returned to parties. (wjf)

11/26/97 — File sent to Brattleboro (Last file folder only) (wjf)

12/1/97 154 AMENDED JUDGMENT (Chief Judge J. G. Murtha) for HRB Royalty, Inc., H&R Block Eastern, H & R Block, Inc. against Rezzonico, John Rezzonico to correct clerical error. Notice to Litigants — Appeal to be filed by 12/30/97. Cy to parties (wjf)

* * * * .

APPENDIX D — AFFIDAVIT OF PETER WELCH DATED MARCH 2, 1998

UNITED STATES COURT OF APPEAL
FOR THE SECOND CIRCUIT

Docket No. 98-7060

JOHN REZZONICO AND JACQUELYN REZZONICO

Appellants

– against –

H&R BLOCK, INC., AND H&R BLOCK
EASTERN TAX SERVICES, INC.

Appellees

AFFIDAVIT OF PETER WELCH

PETER WELCH, being duly sworn, deposes and says:

1. I am an attorney duly admitted to practice law in the State of Vermont and I make this affidavit at the request of Norman A. Olch, the attorney for the appellants in this Court.

2. My law firm, Welch, Graham and Manby, and I represented the appellants in this matter in the United States District Court for the District of Vermont.

3. Shortly after November 26, 1997 I received from the Clerk of the District Court written notice pursuant to F.R.C.P. 77(d) informing me that the judgment had been entered and

that pursuant to F.R.A.P. 4(a)(1) the Notice of Appeal had to be filed within 30 days or by December 29, 1997. (Appellee Ex. 4). A copy of the judgment was attached to the notice.

4. Shortly thereafter I received from the Clerk of the Court a copy of the Amended Judgment, together with a Rule 77(d) notice, informing me that the judgment had been entered December 1, 1997 and that I had to file the Notice of Appeal by December 30, 1997. (Appellee Ex. 6).

5. I was also aware that in the Amended Judgment the court inserted and underscored the word "not". (Appellee Ex. 5, p. 3, ¶2).

6. Based on the second Rule 77(d) notice, and on the nature of the change made in the Amended Judgment, on December 15, 1997 I filed a Motion for a New Trial pursuant to F.R.C.P. 59. Excluding intervening Saturdays and Sundays, *see* F.R.C.P. 6(a), the motion was filed within 10 days of the December 1, 1997 entry of the Amended Judgment as required by Rule 59(b). That same day I filed a Motion for Reconsideration of a prior order of the court.

7. On December 17, 1997 an order was entered denying the Rule 59 motion, and on January 13, 1998 I filed a Notice of Appeal. This filing was within 30 days of the entry of the order denying the Rule 59 motion. *See*, F.R.A.P. 4(a)4(E).

8. On or about December 17, 1997 I had a conversation with my associate, Maureen Regan, in which she stated that a deputy clerk of the District Court had assured her that while

the District Judge had denied my Motion for Reconsideration as "untimely", the judge considered the Rule 59 motion timely and had denied it on the merits.

9. At no time while this matter was pending in the District Court did I receive any communication or notification from the District Judge, from the clerk of the court, or from opposing counsel that the Rule 59 motion was untimely or that I should otherwise disregard the Rule 77(d) notice informing me that the time to appeal was now measured from the entry of the Amended Judgment on December 1, 1997. If I had received any such communication I would have filed the Notice of Appeal within 30 days of the November 26, 1997 entry of the original judgment.

Dated at Hartford, VT this 2nd day of March, 1998.

s/ Peter F. Welch
Peter F. Welch

STATE OF VERMONT
WINDSOR COUNTY, SS.

Subscribed and sworn to before me this 2nd day of March, 1998.

s/ [illegible]
Notary Public
My Commission Expires: 2/10/99
Please Affix Seal

Supreme Court, U.S.
FILED
FEB 15 2000
CLERK

(3)

No. 99-1093

In The

Supreme Court of the United States

October Term, 1999

JOHN REZZONICO and JACQUELYN REZZONICO,

Petitioners,

-against-

H & R BLOCK, INC and H & R BLOCK EASTERN TAX SERVICES, INC., HRB ROYALTY, INC.
Add as party from consolidated case,

Respondents

PETITION FOR WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

NORMAN A. OLCH
Attorney for Petitioner
233 Broadway
New York, New York 10279
(212) 964-6171

PRINTINGHOUSE PRESS 25 WEST 43 RD STREET NEW YORK, NY 10036 (212) 719-0990

888

TABLE OF CONTENTS

Table of Contents i

Table of Cited Authorities ii

Reply to Respondents' Opposition . . . 1

A. Rule 77(d) and "Unique Circumstances" 1

B. Law of the Case 3

Conclusion 5

TABLE OF CITED AUTHORITIES

Cases:

Brown v. *Allen*, 344 U.S, 443 (1953) . . 3

Christianson v. *Colt Industries Operating Corp.*,486 U.S. 800(1988) 3

Hollins v. *Department of Corrections*, 191 F.3d 1324 (11th Cir.1999) . . 2

LaShawn A. v. *Barry*, 87 F.3d 1389 (D.C. Cir. 1996)(en banc) 3

Prudential-Bache Securities, Inc. v. *Fitch*, 966 F.2d 981 (5th Cir. 1992) 2, 3

U.S. v. *Ibarra*, 502 U.S. 1 (1991) . . . 1

Other Authorities:

Federal Rule of Appellate Procedure 4(a)(6) 1

Federal Rule of Appellate Procedure 35 4

Note, *Committee on Rules of Practice and Procedure of the Judicial Conference of the United States*, 134 F.R.D. 698 3

Second Circuit Local Rule 27(i) 4

REPLY TO RESPONDENTS' OPPOSITION

A. *Rule 77(d) and "Unique Circumstances*

Respondents' defense of the ruling below invites confusion for the Bench and Bar. While litigants should not "be required to guess at their peril the date on which the time to appeal commences to run," *U.S.* v. *Ibarra,* 502 U.S. 1, 7 (1991), respondents, and the Second Circuit, offer no principled or workable rule for determining whether or when an attorney can rely on the F.R.Civ.P. 77(d) notice for measuring the date from which the time to file a notice of appeal commences.

Outside the Second Circuit the rule is sensible and workable: a party can rely on a Rule 77(d) notice or other official written communication from the district court clerk's office which is regular on its face. Pet. at 5 and cases cites thereat.

Instead of guidance and a "clear general rule," *U.S.* v. *Ibarra,* 502 U.S. at 7, respondents advance an unprincipled regime in which litigants must "guess at their peril." In such a setting, as this Court has noted in the context of criminal notices of appeal, "prudent attorneys" will file unnecessary notices of appeal, while the "less prudent" will burden the Circuit Courts with litigation on the timeliness of the notice of appeal. "Neither development would be desirable." *Id.*

In this regard, while petitioner has argued that the Second Circuit's approach cannot be harmonized with Federal Rule of Appellate Procedure 4(a)(6), Pet. at 6-7, it is noteworthy that respondents do not address this important rule at all. As the draftsmen have indicated, Rule 4(a)(6) recognizes the reliance parties place on the clerk's 77(d) notice for measuring the time to file a notice of appeal. Pet. at 6 and citations thereat. Outside the Second Circuit such reasonable reliance is recognized and appreciated; respondent and the ruling below, however, eschew litigants' reasonable expectations regarding official written communications from the clerk's office.

And while respondent contends that petitioner has mischaracterized and contorted the case to manufacture a circuit

conflict, Res. Opp. at 1, respondent cannot cite even a single case outside the Second Circuit which supports the outcome below.

Respondent and the Second Circuit maintain that the "unique circumstances" doctrine should not apply because the clerk of the district court is not a "judicial officer" under that doctrine, and because, in any event, the doctrine should apply only where a party has relied upon "truly clerical matters" performed by the clerk's office. Res. Opp at 6. Respondent, however, is careful to omit reference to decisions that because the clerk is disseminating information on behalf of a judge, and because the public relies on the clerk for such information, he is a "judicial officer" for purposes of the "unique circumstances" doctrine. *Hollins* v. *Department of Corrections,* 191 F.3d 1324, 1328 (11th Cir. 1999); *Prudential-Bache Securities, Inc.* v. *Fitch,* 966 F.2d 981, 985-986 (5th Cir. 1992). It is also unclear from respondents' opposition in what way the clerk's notice, which is mandated by Rule 77(d) and can be served only by the clerk, is not a "truly clerical matter."

Finally, respondent argues that petitioner's counsel should not have relied on the second 77(d) notice because the docket sheet entry indicated that the second judgment was entered "to correct clerical error." Res. Opp. at 6. But reference to the docket sheet begs the question of whether a party can rely on the 77(d) notice.

The clerk is not required to send the docket sheet to a party, and he did not do so here. He sent only the 77(d) notice. Requiring a party to also view the docket sheet would defeat the notification scheme under the Federal Rules of Civil Procedure: "[Appellants] were not required to view the actual docket sheet to determine the date of entry of the order. Such a requirement would nullify the notice procedures in Rules 5 and 77 of the Federal Rules of Civil Procedure." *Prudential-Bache Securities, Inc.* v. *Fitch,* 966 F.2d at 986.

Requiring parties to independently examine the docket sheet would also run counter to the conclusions of the draftsmen of the Federal Rules of Appellate Procedure: experience shows that because an increasing number of litigants and their attorneys do not reside near the federal court in which an action is pending,

their growing reliance on the clerk's office and the 77(d) notice is reasonable and is to be expected. Note, *Committee on Rules of Practice and Procedure of the Judicial Conference of the United States*, 134 F.R.D. 698, 699.[1]

B. *Law of the Case*

Respondents argue at length that even if there is a conflict among the circuits over whether the law of the case applies to jurisdictional determinations of one panel of a circuit court, the law-of-the-case is merely a discretionary matter not worthy of this Court's consideration. Res. Opp. at 12-18. For several reasons respondents' argument is unconvincing.

First, the mere fact that different circuits take different views on whether the law of the case applies to jurisdictional determinations strongly suggests that matters of important principle are at issue. Indeed, respondents have no rejoinder to the D.C. Circuit's observation that the law of the case should be followed in jurisdictional matters because "[i]nconsistency is the antithesis of the rule of law." *LaShawn A.* v. *Barry,* 87 F.3d 1389, 1393 (D.C. Cir. 1996)(en banc); *Christianson* v. *Colt Industries Operating Corp.,* 486 U.S. 800, 817 (1988)(courts should be "loathe" to depart from the law of the case).

Second, to state that the application of the law of the case is discretionary is the beginning of the inquiry not its conclusion. A court's exercise of discretion is not a lawless enterprise but must be guided by sound and articulated principles appropriate to the case at hand. "Discretion without a criterion for its exercise is authorization of arbitrariness." *Brown* v. *Allen,* 344 U.S, 443, 496 (1953)(Frankfurter, J.). Here, for instance, the jurisdictional record and information before the second panel were exactly the same as that before the first panel. The only discernible difference between the first and second decisions of the court is that three different judges heard the claim the second time.

1

In this case the office of petitioner's counsel was in White River Junction, Vermont, or an approximately 200 miles roundtrip from the courthouse in Burlington, Vermont.

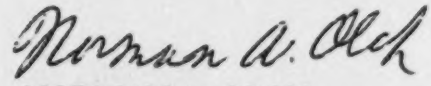
Third, Federal Rule of Appellate Procedure 35 and Second Circuit Local Rule 27(i) both provide for in banc review of panel decisions whether on appeals, motions or other proceedings. In banc review was not sought here. Respondents assert that bypassing the established process to secure three different judges for a second panel should be of no concern to this Court. Res. Opp. 19-20. The claim, however, is inimical to the rule of law and undermines the statutory structure of three-judge panels whose rulings can only be reviewed in banc or by this Court. Pet. at 10.

Finally, jurisdictional decisions are different. If jurisdiction is recognized, as it was here by the first panel, the decision creates the reasonable expectation among litigants that the appeal will be decided on the merits briefs and not on the previously rejected jurisdictional claim.

CONCLUSION

THE PETITION SHOULD BE GRANTED TO RESOLVE (1) THE CONFLICT IN THE CIRCUITS OVER WHETHER A FEDERAL CIVIL APPELLANT CAN RELY ON THE CLERK'S RULE 77(d) WRITTEN NOTICE OF ENTRY OF JUDGMENT TO MEASURE THE TIME WITHIN WHICH TO FILE A NOTICE OF APPEAL; (2) WHETHER THE "UNIQUE CIRCUMSTANCES" DOCTRINE WILL APPLY WHEN A PARTY RELIES ON AN INCORRECT OR MISLEADING RULE 77(d) NOTICE; AND (3) THE CONFLICT IN THE CIRCUITS OVER WHETHER THE LAW OF THE CASE APPLIES TO CIRCUIT COURT JURISDICTIONAL DETERMINATIONS.

Respectfully submitted,



NORMAN A. OLCH
Attorney for Petitioners
233 Broadway
New York, New York 10279
(212)964-6171

February 14, 2000.